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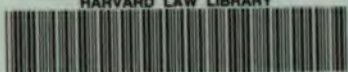
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**MASSACHUSETTS REPORTS**  
**107**

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**CASES ARGUED AND DETERMINED**  
**IN THE**  
**SUPREME JUDICIAL COURT**  
**OF**  
**MASSACHUSETTS**

**MARCH—OCTOBER 1871**

**ALBERT G. BROWNE, JR.**  
**REPORTER**

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**JUDGES**  
**OF THE**  
**SUPREME JUDICIAL COURT**  
**DURING THE TIME OF THESE REPORTS.**

**HON. REUBEN A. CHAPMAN, CHIEF JUSTICE.**  
**HON. HORACE GRAY, JR.**  
**HON. JOHN WELLS.**  
**HON. JAMES D. COLT.**  
**HON. SETH AMES.**  
**HON. MARCUS MORTON.**

---

**ATTORNEY GENERAL,**  
**HON. CHARLES ALLEN.**

**The Reporter was assisted by Mr. JOHN C. GRAY, JR., of the  
Suffolk Bar, in the preparation of this volume.**



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**CASES**  
**ARGUED AND DETERMINED**  
**IN THE**  
**SUPREME JUDICIAL COURT,**  
**AT THE**  
**MARCH SESSION 1871, IN BOSTON.**  
[CONTINUED FROM VOL. CVL.]

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**PRESENT:**

HON. REUBEN A. CHAPMAN, CHIEF JUSTICE.		
HON. HORACE GRAY, JR.,	}	JUSTICES.
HON. JOHN WELLS,		
HON. JAMES D. COLT,		
HON. SETH AMES,		
HON. MARCUS MORTON,		

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**SUFFOLK COUNTY.**

**GEORGE ELLIS & others vs. BOSTON, HARTFORD AND ERIN  
RAILROAD COMPANY & others.**

An indenture by which property was mortgaged to three trustees provided "that in case of the death, resignation or removal of one of said trustees, the premises hereby conveyed. and the trusts hereby created, shall vest in the survivors or survivor, who shall thereupon appoint in writing by deed a person or persons in the place and stead of the trustee or trustees so deceased, resigned or removed, and such appointment and the acceptance thereof shall vest the said premises and trusts in the person so appointed, jointly with the trustee so appointing, as fully as if such appointment had been originally made in this deed: and all subsequent vacancies happening in said trust shall be filled in like manner and with like effect, by the trustee in each case remaining." *Held*, that on the resignation of one, or of two trustees, the trust estate vested in the remaining trustees or trustee, and on a conveyance by them or him to a new trustee or trustees the estate vested in the three.

The title of the trustee in a mortgage given by a railroad corporation to secure its bonds is not invalidated by the fact that he is an officer of the corporation.

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*Ellis v. Boston, Hartford and Erie Railroad Company.*

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A contract between an express company and a railroad corporation for carrying express matter over the railroad provided that the corporation should furnish the facilities for transportation, and the company should credit it with forty per cent. of the gross receipts of the business as compensation; that this forty per cent. of the receipts should be credited on promissory notes due from the corporation to the company for sums to be advanced; that, when these notes were discharged by such credits, then the share of the corporation in the gross receipts should be paid to it monthly in cash; and that the contract should continue for five years, and such longer time as might be necessary for the discharge of the notes and interest. Before the notes were discharged, a bill in equity was filed by holders of bonds of the corporation to foreclose a mortgage made by the corporation, of all its property, for the purpose of securing its bonds, to trustees, which provided that until default the use and control of the mortgaged premises should remain with the corporation, and that on a default continuing for six months the trustees should take and operate the railroad, collect the income, and apply the receipts in carrying on the business. Pending the suit in equity, receivers were appointed to preserve the property, run the railroad and receive the earnings thereof. On petition of the express company that the receivers should carry out the contract, as it had been carried out before by the corporation, the court ordered that they should continue the performance of the service required by the contract, but that the compensation due therefor should not be credited on the notes, and its application should be reserved until the determination of the question of foreclosure. Afterwards the railroad corporation was adjudged bankrupt, and subsequently the trustees were placed by the court in possession of the property of the corporation, upon paying or securing to the receivers their expenses and charges in running the railroad. The receivers then moved that the express company pay to them the compensation due for carrying out the contract from the time of their appointment until the trustees were put into possession. The assignees in bankruptcy consented to the payment to the receivers. But the trustees claimed the compensation on the ground that the possession of the receivers was a possession on their behalf. *Held*, that the lien of the mortgagees attached to the earnings of the railroad only from the time of their being put into possession of the property of the corporation, but that they were entitled to be repaid their advance to the receivers so far as it was applied to the expenses and charges of the receivers in managing the ordinary business of the corporation in their hands, and also, with the assent of the assignees, to all the compensation which was earned after the date of the bankruptcy, not needed for the expenses of the receivers; and that, as to the compensation earned before the bankruptcy, the express company must pay so much as was necessary to reimburse the receivers for their expenses and charges, and the balance, if any, they could apply to the reduction of the debt of the corporation to them.

An express company contracted with a railroad corporation for the carrying of express matter over the road of the corporation and the routes of other corporations leased or controlled by it, the amounts due to the railroad corporation for freight to be applied in repayment of money to be advanced by the express company. The railroad corporation became insolvent, and receivers, appointed on a bill in equity filed by mortgagees of the corporation, having continued to carry the express matter over the roads, filed a motion that the express company should pay them in cash for so doing. *Held*, that the fact that the officers of the leased and controlled corporations induced the express company to enter into the contract and make the advance, by representations that they might safely do so, was no answer, in whole or in part, to the motion, it not appearing that the money paid by the express company was apportioned among the corporations, either by the contract between the company and the insolvent corporation, or by the contracts between the latter and the other corporations, and the other corporations not being parties to the proceedings.

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 Ellis v. Boston, Hartford and Erie Railroad Company.
 

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A railroad corporation, to secure payment of its bonds, made an indenture, styled a mortgage, with trustees, which was confirmed by the legislature, and by which it conveyed to the trustees all the property, corporeal and incorporeal, then owned by it or thereafter to be acquired, provided that on payment of the bonds the estate granted should be void, the indenture being on the terms, conditions and agreement that until default the use and control of the granted premises should remain with the corporation, and providing that on a default continuing for six months the trustees should take and operate the road, collect the income, and apply the receipts in carrying on the business; and that, if the default should continue for eighteen months after possession taken, all equity of redemption should be foreclosed, and the mortgaged property should vest absolutely in the trustees. The trustees took possession under the provisions of the indenture. *Held*, that they were not bound by a contract concerning the carrying of express matter, entered into by the railroad corporation, after the making of the indenture, with one who had notice thereof.

BILL IN EQUITY, filed July 20, 1870, by George Ellis, Matthew Bolles and Michael S. Bolles, in their own behalf, and in behalf of such holders and owners of the bonds secured by the mortgage hereinafter mentioned as should become parties plaintiff, or join in the prosecution of the suit.

The bill alleged that the plaintiffs were holders of bonds issued by the Boston, Hartford & Erie Railroad Company, and secured by a mortgage \* of its property to Robert H. Berdell, Dudley S.

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\* This instrument was styled an "Indenture of Mortgage, by and between the Boston, Hartford and Erie Railroad Company, a corporation existing under the laws of the states of New York, Connecticut, Rhode Island and Massachusetts, party of the first part, and Robert H. Berdell, Dudley S. Gregory and John C. Bancroft Davis, trustees, parties of the second part;" and after reciting the vote for the issue of bonds to the amount of \$20,000,000 by the company, provided "that the parties of the first part, for the better securing and more sure payment of the sums of money mentioned in the said mortgage bonds, and each of them, according to the tenor thereof, and in consideration of one dollar, to them paid by the parties of the second part, at or before the enrolling hereof, the receipt whereof is hereby acknowledged, have granted, bargained, sold, conveyed, aliened, released and confirmed, and by these presents do grant, bargain, sell, convey, aliene, release and confirm, unto the said parties of the second part, and the survivor of them, and to his and their successors and assigns, all and singular the railways of said Boston, Hartford and Erie Railroad Company," describing them, "as said railways are now or shall be located, constructed or improved, under or by virtue of any powers now granted, or that may hereafter be granted or obtained, to locate, construct or use a railroad on any of said indicated lines, with all the lands that are included, or may be included, in the location of said railway or acquired for the uses of said com-



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Ellis v. Boston, Hartford and Erie Railroad Company.

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Gregory and John C. B. Davis, dated March 19, 1866, and confirmed and ratified by an act of the legislature of this Common-

pany within the terminal points aforesaid, but not including the lands at the termini at Boston and at Fishkill, which are outside of the location of said railroad, together with all their lands, tracks, lines, rails, bridges, ways, depots, stations, water-tanks, shops, buildings, piers and wharves, erections, fences, walls, fixtures, privileges, franchises, rights, leases and charters; also all the like estate, roads, railroads and structures, and matters and things pertaining or belonging thereto, that may be hereafter acquired or constructed, or belong to or be controlled by the party of the first part.

"Together with all the tolls, income, issues and profits to be had from the same, and all rights to receive and recover the same, and everything necessary for the complete use of the road; also all the locomotives, engines, tenders, cars, carriages, tools, shops, fixtures and machinery, and all the coal, wood and other fuel belonging or appertaining to said railroad, or that may at any time hereafter belong or appertain to the same, as it may be changed by use and new acquisitions; also all the estate, real, personal and mixed, of any of the foregoing descriptions, or of any other kind which may be hereafter acquired by the party of the first part, and used, or intended to be used, in the construction and operation of the said railroad.

"To have and to hold the same, together with all and singular the emoluments, income and advantages, tenements, hereditaments and appurtenances thereunto belonging, unto the said parties of the second part and the survivor of them, and his and their successors and assigns forever, on the trusts, and for the uses and purposes herein declared, and none other.

"Provided always, and these presents are upon the express condition, that if the said parties of the first part shall well and truly pay, or cause to be paid, to the holders of the said mortgage bonds or obligations, intended to be secured hereby, and every of them, the principal sums of money therein mentioned, according to the true intent and meaning thereof, with interest thereon, at the times and in the manner therein provided, according to the true intent and meaning of these presents, that then and from thenceforth this indenture and the estate hereby granted, shall cease, determine and be utterly void.

"And this indenture further witnesseth, that these presents, and the said mortgage bonds or obligations, hereby intended to be secured, are made, executed and delivered, upon the terms, conditions and agreements following, that is to say:

"*First.* That the actual possession, use, management and control of all the granted premises, shall remain with the parties of the first part, so long as the said mortgage bonds shall remain without default or forfeiture, who may from time to time, with the consent of the trustees in writing, sell or exchange any of the mortgaged estate, and purchase with the proceeds other property, to be included under this indenture.

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wealth, passed April 12, 1866 (St. 1866, c. 142); that there was, and had been for more than six months, a default in the

*"Second.* That in the case of the death, resignation or removal of one of said trustees, the premises hereby conveyed, and the trusts hereby created, shall vest in the survivors or survivor, who shall thereupon appoint in writing, by deed, a person or persons in the place and stead of the trustee or trustees so deceased, resigned or removed, and such appointment and the acceptance thereof shall vest the said premises and trusts in the person so appointed, jointly with the trustee so appointing, as fully as if such appointment had been originally made in this deed; and all subsequent vacancies happening in said trust shall be filled in like manner and with like effect, by the trustee in each case remaining. And in case of the decease, removal or resignation of all of said trustees, the vacancies may be filled by any judge of the supreme court of the state of Connecticut, on application of any party interested, on such notice to the other parties interested as the judge acting shall order; and the trustees so appointed and accepting shall become vested with all the franchises and estate hereby conveyed, on recording or lodging a certified copy of the order for their appointment in all places where this mortgage is required by law to be recorded or lodged.

"And this indenture further witnesseth, that the said parties of the first part, for themselves and their successors, do covenant and agree to and with the said parties of the second part, the survivor of them, and his and their successors and assigns:

*"First.* That they will, at their own proper charge, do all things necessary to be done to keep intact the lien hereby created.

*"Second.* That they will, at any time or times hereafter, upon the request of said parties of the second part, their successors or assigns, make, do and execute, and cause to be made, done and executed, all and every such further and reasonable acts, conveyances, assignments and assurances in the law, for the better and more effectual vesting and confirming the premises hereby granted, or intended so to be, in and to the said parties of the second part, their successors and assigns forever, as by the said parties of the second part, their successors or assigns, or their counsel learned in the law, shall be reasonably devised, advised or required.

*"Third.* That of the whole issue hereby authorized to be made of said bonds, there shall be retained, in the hands of said parties of the second part, such amount of said bonds as shall be equal to the whole amount of the bonds and mortgage notes outstanding from time to time, which are a lien upon any of the property or franchises hereby conveyed, which are to be delivered to the parties of the first part only on the cancellation of a corresponding amount of said outstanding bonds or mortgage notes.

*"Fourth.* That the party of the first part will, at the close of the year 1869 and at the close of each year thereafter, during the continuance of this trust,

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payment of interest due upon the bonds; that the security was depreciated in value and inadequate; that sundry suits were

pay to the parties of the second part, their successors and assigns, a sum equal to ten per cent. upon the net earnings for the current year, remaining after the payment of the current interest for that year on the then outstanding bonds issued under this mortgage; which sum the said trustees shall invest, as received, in said mortgage bonds, if the same can be purchased, at not exceeding one hundred and twenty-five per cent.; and if they cannot invest the same in said mortgage bonds at that limit, they shall invest them in gold-bearing securities of the United States; and they shall invest all sums received from interest and dividends on the trust fund, in like manner, and shall hold the trust fund as a security for the payment of the said mortgage bonds at maturity, and shall annually, on the first day of January in each year, report the condition of the said trust fund to the secretaries of state of the states of Massachusetts, Rhode Island, Connecticut and New York.

*"Fifth.* That the parties of the first part will pay, unto the holders of the said mortgage bonds respectively, the said principal sums of money respectively mentioned as above, and as expressed in said bonds, and will pay the interest thereon as the same shall become due and payable.

*"Sixth.* That the expenditure of all sums of money, realized by or from the sale of the bonds issued under this mortgage, shall be made with the approval of at least one of the said trustees, whose assent in writing shall be necessary to all contracts made by the party of the first part, before the same shall be a charge upon any of the sums received from said sales.

*"Seventh.* That in case default be made by said company in payment of any moneys, either principal or interest, secured hereby, (the default continuing for six months,) the said company shall, on demand of the trustees or trustee for the time being, or his or their agent, authorized thereto in writing, deliver to said trustees or trustee, or his or their agent, the actual possession of all the herein granted premises, and thereupon the said parties of the second part shall and may, by themselves, their officers, agents and employees, take, receive and operate the said railroad, franchises and other property and estate hereby conveyed, and collect, receive and have the rents, income and profits thereof, as fully as the party of the first part could do if no default had been made; and while so in possession, the said party of the second part shall app. such part of said rents, income and profits, as shall, in their judgment, be necessary to the payment of the running and operating expenses of the road, including the necessary repairs of road, road-bed, buildings, machinery and equipment, and all expense of agents, clerks, officers, employees and laborers, and all claims for damages allowed, and all payments for insurance and taxes, and all items usually distributed to transportation expenses in railroad accounts, and to such increase and improvement of said roads, buildings, machinery and equipment as the business shall, in their judgment, require, and to the payment

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pending against the company, and there were attachments on its property; that its property and business were not properly

of any and all claims necessary to secure and assure to them the estate and franchises hereby conveyed, and to their own compensation, and to the employment of competent legal advisers in their discretion, and to any and all other charges that are or should be allowed by a court of equity in the case of a receiver, as settled and established in the case of the receivership of the New York and Erie Railroad. And the parties of the second part are further authorized and empowered, after having taken possession as aforesaid, to contract with any other corporation to lease or to operate the said railroad and franchises for any period, not exceeding the term that the trustees are herein authorized to retain possession thereof.

*"Eighth.* Said parties of the second part, having taken possession as aforesaid, shall be further authorized, and may be required, whenever there shall be in their possession a sufficient sum for such purpose, (not required for any of the purposes aforesaid,) to pay in full any one class (beginning with the earliest) of matured and overdue interest warrants on said bonds, to the person or persons holding and presenting them for payment; and the said parties of the second part shall, while in possession of said roads and operating the same, or causing the same to be operated on a lease thereof, keep full and accurate accounts of all sums received or paid out by them, which shall be, at all reasonable times, open to the inspection of the party of the first part, and they shall, at least once a year, publish abstracts thereof for the use of the bondholders; and whenever the said parties of the second part are in doubt as to any of their powers or duties in the premises, they may apply to the supreme court of the state of Connecticut, or any judge thereof in chambers, for directions, and the directions or order of said court or of such judge thereof, on their application, when complied with, shall be their full protection for so doing.

*"Ninth.* On taking possession as aforesaid, the said trustees shall file in the office of the secretaries of state of the states of Massachusetts, Rhode Island, Connecticut and New York, a written notice, acknowledged before a notary public, that they have taken possession of said mortgaged property, franchises and estate, for default in the payment of principal or interest, or both, as the same may be, and of their purpose to foreclose the said mortgage for said default. And if the said default shall continue for the space of eighteen months after such notice shall be filed, the whole of the mortgaged premises and franchises shall vest absolutely and in fee in the parties of the second part without further assurance and without further process of law, and all right or equity of redemption of the party of the first part therein shall be forever barred and foreclosed; but if the whole of the principal and interest in arrear, with interest thereon, when the same may by law be demanded, and the lawful claims, disbursements and liabilities of the said trustees, made or incurred as aforesaid,

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managed by the directors; that there was a question as to what persons were now the legal trustees of the mortgage; that the

on account of their trust, shall be paid and satisfied within the said period of eighteen months after the said notices shall have been filed, either by the said party of the first part, (which right they are to have,) or out of the net earnings of the property in the trustees' possession, then the said parties of the second part shall surrender unto the said parties of the first part the said mortgaged property, franchises and estate, and all additions made by them thereto, and the said parties of the first part shall thereupon and thereby become re-vested with the same, as of their former estate, without further assurance.

"*Tenth.* In case of an absolute foreclosure under the provisions of this instrument, it shall be the duty of the trustees to call a meeting of the holders of the mortgage bonds secured by this instrument, by an advertisement of the time and place and object thereof, at least three times a week, for three successive weeks, in newspapers published, one in the city of Boston, one in the city of Providence, one in the city of Hartford, one in the city of New York, and one in London, in England; and the bondholders at such meeting may, at an election to be presided over by such of the parties of the second part, or their successors, as shall be present, and in which each bondholder may cast one vote for every one thousand dollars principal sum of such bonded debt held by him, choose from their number a board of directors of like number with the then board, and may organize themselves into a corporation, with a corporate name to be selected by them, and a capital stock equal to such outstanding mortgage debt, divided into shares of one hundred dollars each, which said corporation shall be invested with all the powers, privileges, and franchises, and shall be subject to all the duties, liabilities and restrictions of the Boston, Hartford and Erie Railroad Company, and shall consist of the holders of the mortgage bonds secured hereby, at the rate of ten shares for every bond of one thousand dollars, or of two hundred pounds sterling, as said bonds shall be surrendered to said new corporation to be exchanged for certificates of stock, at the rate aforesaid. And the said parties of the second part shall, by deed, convey unto the said new corporation all the said mortgaged property, premises, estate and franchises, and all additions thereto, and all moneys remaining in their hands, when they shall be fully paid and indemnified for their services and liabilities as hereinbefore provided; copies of which said deed shall be recorded or lodged wherever this instrument is required by law to be recorded or lodged; and upon the organization of the bondholders into a corporation, they shall file, in the offices of the several secretaries of state above named, copies of their proceedings in the organization, under their corporate seals, attested by their president and secretary, which shall be *prima facie* evidence in all suits for or against them that they are a corporation; and after that time no bondholder shall participate in the earnings of the mortgaged property until he surrenders his bonds to the new corporation as herein provided.

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persons acting as such trustees were unsuitable for the trust ; and that the directors of the company were about improperly to issue other bonds, and do certain other acts, to the injury of the company's interests and the prejudice of the bondholders.

It also alleged that a valuable part of the property of the corporation was a lease dated February 9, 1869, which the Boston, Hartford & Erie Railroad Company had taken of the road of the Norwich & Worcester Railroad Company, at a fixed rent, for a hundred years, which gave it the benefit of a contract between the latter company and the Norwich & New York Transportation Company, and secured to it the control of a through line from Boston to New York ; and that there was immediate danger of a forfeiture of this lease through a default in payment of the rent.

The prayer was, that the mortgage might be foreclosed, the property covered by it sold under a decree of the court, and the proceeds distributed and applied to the payment in whole or in part of the bonds, and that " in the mean time, and until the final adjudication of this cause, some proper person may be appointed by this court receiver of all the railroad, rolling stock, franchises, rights and property covered by or embraced in, or intended to be covered by or embraced in said mortgage, and of all the rents, income, profits and issues thereof or therefrom, and apply the same, under the order of this court, with full power to run and operate said road, and with all the other usual and incidental powers ordinarily vested in or granted to receivers in like cases."

On August 2, 1870, upon the application of the plaintiffs, the court, " for the care and preservation of the property of the company," appointed receivers, with full power and authority to take possession of the railroads of the Boston, Hartford & Erie Railroad Company, with all its " privileges, franchises, rights, leases, charters," and all its property, " and the earnings and income thereof and therefrom ;" directed the receivers to " maintain and

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" *Eleventh.* The remedy herein given to said parties of the second part shall not be construed to deprive them or any other parties of their full rights and remedies in the several courts of law and equity in said States, as they exist now or may hereafter exist, and any court of competent jurisdiction may enforce any of the provisions of this instrument."

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keep in repair the said railroads, and operate and carry on the same, or such part thereof as may be practicable and for the interest of all parties concerned, and receive the income from and earnings thereof;" required the officers, agents and employees of the company to surrender the property to the receivers; declared that the legal possession and control of all the property should vest immediately in the receivers; directed them to take and retain possession "of all the property, deeds, leases, contracts, books, papers and vouchers" of which they were appointed receivers; authorized them "at their discretion to dismiss from service any agent or employee of said company, other than the president, directors, treasurer, assistant treasurer, secretary or clerk of said company, and from time to time fill the vacancy as occasion may require;" to make all necessary contracts and disbursements for carrying on the road, settle "all legal and just claims for damages or injuries to persons or property claimed against them, incurred while such receivers," account for all receipts and disbursements, "pay and discharge, out of any moneys which shall be in their hands, as such receivers, any sums due from" said company, "for labor performed after the first day of June last in operating its road, or supplies or material furnished the said company after that day for operating its road, including all salaries due or payable by said company to its officers, for services performed by them for said company since said first day of June," and pay all sums necessary "to preserve any leasehold interests or leasehold rights, or other rights, or any property, easements or rights of way."

Upon the application of other creditors of the company, in like interest with the plaintiffs, the court, after notice and hearing thereon, admitted them to join in the prosecution of the suit.

Hearing upon agreed facts as to what persons were now the legal trustees of the mortgage, before *Gray, J.*, who reserved the question for the decision of the full court. The facts are stated in the opinion.

*B. F. Brooks*, for the plaintiffs.

*W. G. Russell & T. K. Lothrop*, for other parties in like interest.



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*J. G. Abbott, (J. P. Healy with him,) for the trustees.*

*E. L. Pierce, for the Commonwealth.*

CHAPMAN, C. J. The questions presented on this hearing relate merely to the validity of the assignments which have been made of the mortgage executed by the company to Berdell, Gregory and Davis, dated March 19, 1866. The mortgage was made in trust to secure the bonds of the company to the amount of twenty millions of dollars, to be thereafter issued. The mortgage is in form an indenture, the trustees being called the parties of the second part. The conveyance is made to have and to hold "unto the said parties of the second part and the survivor of them, and his and their successors and assigns forever, on the trusts, and for the uses and purposes herein declared, and none other." One of the "terms, conditions and agreements" upon which the conveyance is made is as follows :

"*Second.* That in the case of the death, resignation or removal of one of said trustees, the premises hereby conveyed, and the trusts hereby created, shall vest in the survivors or survivor, who shall thereupon appoint in writing, by deed, a person or persons in the place and stead of the trustee or trustees so deceased, resigned or removed, and such appointment and the acceptance thereof shall vest the said premises and trusts in the person so appointed, jointly with the trustee so appointing, as fully as if such appointment had been originally made in this deed ; and all subsequent vacancies happening in said trust shall be filled in like manner and with like effect, by the trustee in each case remaining. And in case of the decease, removal or resignation of all of said trustees, the vacancies may be filled by any judge of the supreme court of the state of Connecticut, on application of any party interested, on such notice to the other parties interested as the judge acting shall order ; and the trustees so appointed and accepting shall become vested with all the franchises and estate hereby conveyed, on recording or lodging a certified copy of the order for their appointment in all places where this mortgage is required by law to be recorded or lodged."

On February 27, 1867, Berdell by an instrument in writing resigned his trust, and by indenture of October 28, 1867, between

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Gregory, Davis and John S. Eldridge, the latter is appointed trustee as successor to Berdell, and they convey to him the interest in the property which had before belonged to Berdell.

On December 31, 1868, by an instrument under seal and acknowledged, Davis and Gregory each resigned his trust, and assigned all his right, title and interest in the property to Eldridge.

On August 16, 1869, by indenture between Eldridge of one part, and Mark Healey and Henry N. Farwell of the second part, he appointed the latter his co-trustees, and assigned to them a joint interest in the property.

On March 16, 1870, Healey and Farwell, by an instrument of that date, under seal and acknowledged, resigned their trust, and assigned their interest in the property to Eldridge; and on the same day, by indenture between Eldridge of one part and Thomas Talbot and Moses Kimball of the other part, reciting all the prior appointments and resignations, he appoints them his co-trustees, and assigns to them a joint interest in the property.

On the same day, by an instrument under seal and acknowledged, Eldridge resigned his trust, and assigned to Talbot and Kimball all his interest in the property.

On July 25, 1870, by indenture between Talbot and Kimball of one part, and Avery Plumer of the second part, they appointed him co-trustee with them, and assigned to him a joint interest in the property.

The question submitted to the court is, whether Talbot, Kimball and Plumer are now the trustees and hold the legal title to the mortgaged property.

It is obvious from the foregoing recital, that the resignations, appointments and conveyances have all been made in conformity with the terms of the mortgage. The clause above cited authorizes any of the trustees to resign at his pleasure. It provides that upon such resignation the trusts shall vest in the survivor or survivors. When Berdell resigned, he made no conveyance to the survivors. But such conveyance was not required by the terms of the instrument, and it is well settled that the person who creates the trust may mould it in whatever form he pleases, and may therefore provide that on the occurrence of certain events

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and the fulfilment of certain conditions, the original trustee may retire, and a new one be substituted. Lewin on Trusts, (5th ed.) 459. It is also well settled that a disclaimer of a trust by one of several trustees vests the estate in the remaining trustees without any express provision of the will or deed, and in that class of cases, where a vacancy results from the incapacity of the trustee or his removal from the country, the necessity of the case and the want of power to compel a conveyance requires the court to recognize the power of the remaining trustee to convey to his co-trustee without a conveyance from the retiring trustee. *Cape v. Bent*, 9 Jur. 653. *O'Reilly v. Alderson*, 8 Hare, 101. *Mc-nard v. Welford*, 1 Sm. & Gif. 426. *Eaton v. Smith*, 2 Beav. 236. *Cooke v. Crawford*, 13 Sim. 91. *In re Moravian Society*, 26 Beav. 101.

The estate created by the mortgage is in legal effect an estate in joint tenancy in three trustees, determinable either by death, resignation or removal; and limited over, upon the happening of either event, to the survivors, until they shall appoint a new trustee, and convey to him so as to vest the estate jointly in themselves and the new trustee.

The appointment of new trustees has been by the survivors or survivor while in office, so that it is not like the cases where an appointment by a retiring trustee of a successor in his own place has been held invalid. It has been done as the instrument directs, and a proper conveyance has been made to each new trustee. In the cases where it has been held invalid, the execution has not conformed to the power.

The question has been suggested, whether Eldridge, Farwell and Healey were competent to act as trustees for the bondholders, they being at the time officers of the corporation. This fact cannot affect their capacity to hold and pass the title, which is the only question now before us; for the individuals who are officers are distinct from the corporation itself, and may make contracts with it, make conveyances to it, and receive conveyances from it; and, in general, all persons are competent to be trustees.

On the whole, we can see no ground to doubt that the present trustees have been legally appointed, and that their title to the

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trust property is valid. It is obvious that the contingency which would authorize an application to the supreme court of the state of Connecticut has never arisen, there never having been a vacancy of all the trustees at any one time.

*Title of the present trustees declared valid.*

On September 30, 1870, the Adams Express Company filed a petition, which set forth that on April 1, 1869, the petitioners entered into an indenture with the Boston, Hartford & Erie Railroad Company, which provided that the petitioners should transport their express matter or freight over the railroad of that corporation, and the lines leased and operated by it, and it should give them the necessary facilities therefor; that the petitioners should credit the Boston, Hartford & Erie Railroad Company, as its share of the proceeds of the business, with forty per cent. of the gross receipts, with certain deductions, and the remaining sixty per cent. of the gross receipts should be retained by the petitioners as their share in the proceeds of the business; that the petitioners should lend and advance to the Boston, Hartford & Erie Railroad Company the sum of \$200,000, for which they should receive its note or notes, with the pledge of 10,000 shares of their capital stock as collateral security for the repayment of the \$200,000 with interest; "that the forty per cent. of the gross receipts herein above allotted to" the Boston, Hartford & Erie Railroad Company "may be credited when due upon said notes, and shall, to the extent of such credit, discharge the same, and when such credits shall amount to the said sum of \$200,000 and interest so to be advanced, then the said notes and the 10,000 shares of the capital stock shall be surrendered to" the Boston, Hartford & Erie Railroad Company, and the petitioners "shall thereafter pay monthly in cash to" the Boston, Hartford & Erie Railroad Company "its share of the gross receipts as hereinbefore provided;" that the contract should continue in force until the \$200,000 and interest to be advanced should be wholly repaid, "whether during the term hereinafter fixed as a limit to this contract, or not;" and that the contract should continue for five years from its date.

The petition further alleged that the petitioners faithfully fulfilled all their part of the agreement and advanced the \$200,000 to the Boston, Hartford & Erie Railroad Company; that there remained due upon the \$200,000, on the principal \$104,762, and for interest \$12,582; that the stock given as collateral security was worth not more than \$58,000; and that the receivers had notified the petitioners that they did not regard the contract as binding upon them, and would terminate it on the first day of October next.

The prayer was, that the receivers might carry out and comply with all the terms of the contract, in the same manner and to the same extent as they were being carried out by the Boston, Hartford & Erie Railroad Company before the appointment of the receivers.

The receivers answered, admitting the making of the contract, requiring proof, if material, that the petitioners had performed their part of it, alleging that it was grossly unconscionable, and denying that they were bound by it. The matter was referred to a master, who reported that the contract was just and fair, and that the petitioners had performed their part thereof. The case was reserved by *Gray, J.*, on the petition, answer and master's report, for the determination of the full court, such order or decree to be entered as justice and equity might require.

*B. R. Curtis, & C. A. Seward* (of New York), for the petitioners. The receivers stand in all respects in place of the railroad company. *Jefferys v. Dickson*, Law Rep. 1 Ch. 183, 190. *Receivers v. Paterson Gas Light Co.* 3 Zab. 283. *Hyde v. Lynde*, 4 Comst. 387. *Devendorf v. Beardsley*, 23 Barb. 656. *Bell v. Shibley*, 33 Barb. 610. *Curtis v. Leavitt*, 15 N. Y. 9. *Lincoln v. Fitch*, 42 Maine, 456. Their rights are the same as those of the assignees of a bankrupt, who take the bankrupt's estate subject to all the equities which affect him. *Ridout v. Brough*, Cowp. 133. *Mitford v. Mitford*, 9 Ves. 87, 100. *Brown v. Heathcote*, 1 Atk. 160. *Ex parte Stephens*, 11 Ves. 24. *Clason v. Morris*, 10 Johns. 524, 540. *Murray v. Lyllburn*, 2 Johns. Ch. 441. *Mumford v. Murray*, 1 Paige, 620. *Smith v. Kane*, 2 Paige, 303. *Van Epps v. Van Deusen*, 4 Paige, 64. *Ex parte*

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*Newhall*, 2 Story, 360. *Winsor v. McLellan*, Ib. 492, 495. *Mitchell v. Winslow*, Ib. 630. *Fletcher v. Morey*, Ib. 555. *Winsor v. Kendall*, 3 Story, 507. *In re Hambright*, 2 Bankr. Reg. 157. 2 Story Eq. § 1411.

*C. B. Goodrich & J. D. Ball*, for the receivers.

WELLS, J. The receivers were appointed upon a bill in equity, brought by certain creditors of the Boston, Hartford & Erie Railroad Company, holding bonds secured by a mortgage of its road, property and franchises to trustees therein named. The suit is brought in behalf of themselves and all other creditors holding like bonds. They allege a default in the payment of interest due upon said bonds; that the security is depreciated in value and inadequate; that sundry suits are pending against the corporation, and attachments upon its property; that the property and business of the corporation are not properly managed by the directors; that there is some question as to what persons are now the legal trustees of said mortgage; and that the persons acting as such trustees are unsuitable for the trust. They also allege that the directors of the corporation are about to issue improperly other bonds, and to do certain other acts to the injury of the interests of the corporation, and to the prejudice of said bondholders. They pray that receivers may be appointed to preserve and protect the property; that said mortgage may be foreclosed, the property sold under a decree of this court, and the proceeds distributed and applied to the payment in whole or in part of the said bonds.

It has not yet been determined whether the court will proceed to a foreclosure of the mortgage, and a sale of the property and distribution of the proceeds, according to the prayer of this bill. In the mean time, pending the suit, the receivers are directed, for the care and preservation of the property, to take possession of the road, with all its property, franchises and rights, including the earnings and income thereof; "to maintain and keep in repair the said railroads, and operate and carry on the same, or such part thereof as may be practicable and for the interest of all parties concerned; and receive the income from and earnings thereof." They are authorized to dismiss any of the agents or servants of

the corporation, and to employ others ; to make all necessary contracts and disbursements for the purpose of carrying on the road, and to make certain other payments particularly specified ; and are required to account for all receipts and disbursements.

The payment of debts of the corporation, previously contracted, would be inconsistent as well with the nature and purpose of the office of the receivers, as with the terms of their appointment. They have no right to appropriate the property and assets of the corporation for that purpose, nor the earnings of the road while operated by them. The amounts to be allowed under the contract of the corporation with the petitioners are earnings of the road, to be acquired by service requiring outlays by the receivers, and are a part of its legitimate assets, as much as if due in money. By the terms of the contract, they are to be applied to the debt of the corporation. But that contract constitutes no lien upon the property or franchise of the corporation ; and it is no more obligatory upon the receivers, either to make the application or to render the service, than the debt itself is. To fulfil that contract in all its terms will be, in substance and effect, to appropriate the use of the property and the earnings of the road, *pro tanto*, to the payment of the debt to the petitioners, in preference to all others. The receivers may properly refuse so to do.

But as they hold the property at present only provisionally, and, until the ultimate disposition of the case, it is uncertain whether it will be disposed of for distribution to creditors, according to their respective rights, under direction of the court, or restored to the corporation, such direction should be given as will in one event secure to the creditors, in whose behalf that bill is brought, all their just rights, and at the same time, in the other event, disturb, as little as may be, the relations and rights of the corporation, and of other parties under their contracts with the corporation. This will be accomplished most nearly, if the receivers are directed to continue the performance of the service required by the contract, leaving the question of the application of the amount to become due as compensation therefor, either under the contract or otherwise, or the payment thereof to the receivers, to be determined hereafter, when the ultimate disposition of the



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property and of the suit aforesaid shall have been decided ; the petitioners meanwhile keeping and rendering accounts thereof, and paying or securing to the receivers the share of said earnings to which they are entitled for the service so rendered by them.

*Ordered accordingly.*

On October 20, 1870, a petition in bankruptcy was filed in the district court of the United States for the district of Massachusetts, against the Boston, Hartford & Erie Railroad Company, and on March 2, 1871, the corporation was adjudged bankrupt.

On March 1, 1871, this bill in equity against the corporation was taken *pro confesso*, and on May 9, 1871, a decree of foreclosure was passed, which provided that upon payment by the trustees under the mortgage, to the receivers, of all sums which they had advanced and borrowed under order of the court, of a proper compensation to them for their services, of all debts, liabilities and damages, which could be ascertained, incurred by the receivers, and upon the giving of security by the trustees for all debts, liabilities and damages, incurred by the receivers, which could not be ascertained, the receivers should deliver to the trustees the railroad and all other property in their hands ; but that the receivers should still continue in office ; that the trustees, on taking possession, should file the notices required by the mortgage ; and that, if for eighteen months after the filing of the notices the default should continue, then the property should vest absolutely and in fee in the trustees, without further assurance and without further process of law, and all right or equity of redemption of the Boston, Hartford & Erie Railroad Company should be barred and foreclosed. On August 17, 1871, the trustees having made the payments and given the security required by the decree of foreclosure, the receivers in pursuance of an order of the court delivered the possession of the railroad and all other property of the Boston, Hartford & Erie Railroad Company into the hands of the trustees.

On October 21, 1871, the receivers filed a motion that the Adams Express Company pay to them the sum of \$69,207, for services performed by the receivers in transporting express matter

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and freight between the date of their appointment and the time when the trustees were put in possession, being the forty per cent. of the gross receipts mentioned in the contract. The motion set forth the sum in detail, by months. The assignees in bankruptcy of the Boston, Hartford & Erie Railroad Company appeared and consented that the sum should be paid over to the receivers; and the trustees under the mortgage filed a motion that the sum should be paid to the receivers to the end that it might be paid by them to the trustees.

At the hearing on this motion, before *Wells, J.*, the facts above stated appeared, and the Adams Express Company offered to prove other facts, of which the following are all that are now material:

“That before they made the contract of April 1, 1869, with the Boston, Hartford & Erie Railroad Company, the latter had a lease from the Norwich & Worcester Railroad Company, and the benefit of the contract or arrangement of the Norwich & Worcester Railroad Company with the Norwich & New York Transportation Company respecting through freight to and from New York; that the chief express business contemplated by said contract of April 1, 1869, was to and from New York on the road of the Norwich & Worcester Railroad Company and by the boats of the Norwich & New York Transportation Company; that the said proposed contract contemplated that the Adams Express Company should collect all the dues for the express business over the roads of the Norwich & Worcester Railroad Company, and the Boston, Hartford & Erie Railroad Company, and by the boats of the Norwich & New York Transportation Company, should be allowed 60 per cent. thereof as their own compensation, and should allow the residue, being 40 per cent., as compensation to the Boston, Hartford & Erie Railroad Company for all service on its roads or under its contracts, including the Norwich & Worcester Railroad and the boats of the Norwich & New York Transportation Company; that it was further contemplated that the Adams Express Company should make an advance payment of \$200,000 to the Boston, Hartford & Erie Railroad Company, on account of and on the faith and security of said 40 per cent.

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so to be collected, and should retain said 40 per cent. to repay themselves said advance; that said advance and security were essential parts of the contemplated contract; that, while said contract was under consideration by the Adams Express Company, they advised with the Norwich & Worcester Railroad Company and the Norwich & New York Transportation Company respecting the same, and especially as to whether the said companies were bound to furnish to the Boston, Hartford & Erie Railroad Company the facilities for the said express business, and as to whether the Adams Express Company could safely make the advance payment of \$200,000 on the faith and security of said 40 per cent. to be so retained by them; that the said Norwich & Worcester Railroad Company and the said Norwich & New York Transportation Company knew that these matters were of the essence of the proposed contract, and advised the Adams Express Company that they could safely make the said contract and advance payment on the faith and security of the right to retain said 40 per cent., and that such prepayment would be recognized by the said companies as a valid and legal prepayment upon said security; that the Boston, Hartford & Erie Railroad Company knew that the Adams Express Company, in making said contract, relied upon the right to collect and retain the said receipts as security; and that the Adams Express Company did in fact make the contract of April 1, 1869, and the prepayment of \$200,000, on the faith and security of the right to collect and retain the said 40 per cent., and in consequence of the advice and information of the Norwich & Worcester Railroad Company and the Norwich & New York Transportation Company.

“That, when the receivers were appointed by this court, they were notified by the Adams Express Company of the information and assurance they had received from the Norwich & Worcester Railroad Company and the Norwich & New York Transportation Company, and were notified not to pay or contract to pay anything to either of said companies for the transportation of express matter of the Adams Express Company, with any view of calling upon said express company to reimburse or secure them therefor, for the reason, among others, that those companies could not justly

or equitably demand or receive anything in derogation of the right of the Adams Express Company so to retain the said 40 per cent.

“That the receivers have not actually paid to the Norwich & Worcester Railroad Company, or the Norwich & New York Transportation Company, anything for services rendered to the express matter of the Adams Express Company; or have not paid any such amounts as, in addition to their own service rendered, would entitle them to demand the said 40 per cent.”

The case was reported for the determination of the full court on the facts and offer of proof above stated, and the documents and proceedings referred to; “such judgment, decree, order or further direction to be made as shall be deemed and found to be according to justice and equity and the rights of the several parties.” But if any of the facts set forth in the offer of proof, not otherwise appearing or admitted in the case, should be deemed to be material for the proper and final disposition thereof, then the case was to stand for hearing for the proof of such facts.

On December 12, 1871, the Adams Express Company filed a petition against the trustees under the mortgage, praying that they might be restrained from refusing to transport express matter and freight for the petitioners under the contract of the latter with the Boston, Hartford & Erie Railroad Company. At the hearing, before *Wells, J.*, the same facts appeared as at the hearing on the motion of the receivers, with the additional fact that the trustees refused to be bound by the contract; the same offer of proof was made by the Adams Express Company; and the case was reserved for the full court in similar terms. The motion and this petition were argued together in March 1872.

*J. D. Ball*, for the receivers. When the petition of the Adams Express Company was filed, the receivers were in possession of all the property, and all was covered by the mortgage, both that owned at the time of the mortgage and that subsequently acquired, the legislature having legalized the mortgage. *Howe v. Freeman*, 14 Gray, 566, 575. *Pennock v. Coe*, 23 How. 117. *Coe v. McBrown*, 22 Ind. 252. *Pierce v. Emery*, 32 N. H. 484. The receivers are entitled to compensation for the service performed, and when received they hold it for the trustees. When

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the bill was filed, default in payment of interest had continued more than six months, and the mortgagees, by the terms of the mortgage, were entitled to the possession. The receivers were appointed at the instance of the mortgagees and for their benefit, and the mortgagees are entitled to the earnings from the time of the appointment of receivers. Their title relates back to the time of such appointment. *Boyd v. Burke*, 8 Irish Eq. 660. *Howell v. Ripley*, 10 Paige, 43. *Astor v. Turner*, 11 Paige, 436. *Syracuse City Bank v. Tallman*, 31 Barb. 201. *Lofsky v. Mawjer*, 3 Sandf. Ch. 69. *Moore v. Donegal*, 11 Irish Eq. 364. The income after entry belongs to the mortgagees, and the appointment of receivers at their instance is equivalent to an entry. It is an equitable execution against the income and earnings. *Boyd v. Burke*, 8 Irish Eq. 660. The \$200,000 advanced by the Adams Express Company was not a prepayment, but a loan for which they took notes and stock as collateral security. Had it been a prepayment, it would be no defence. Even a lessee of mortgaged property, (and the rights of Adams Express Company are by no means equal to those of a lessee,) cannot, by prepaying his rent to the mortgagor, retain possession against a mortgagee. Even as against the assignees in bankruptcy, had no receivers been appointed, or had there been no mortgage, and the receivers had been appointed under a creditors' bill, the Adams Express Company could not have claimed carriage of their express matter without cash payment. To permit them to do so would be to give them a preference. *Osgood v. Ogden*, 4 Keyes, 70. The receivers were the proper parties to whom payment should be made. *Walcott v. Condon*, 3 Irish Ch. 431. The adjudication of bankruptcy did not divest the title of the receivers, nor can the assignees interfere with their possession. *Sedgwick v. Minch*, 6 Blatchf. C. C. 156. *In re Clark*, 8 Bankr. Reg. 130. *In re Vogel*, 2 Bankr. Reg. 138. *Freeman v. Howe*, 24 How. 450. *Peck v. Jenness*, 7 How. 612, 625. *Wiswall v. Sampson*, 14 How. 52, 66. *Peale v. Phipps*, *Ib.* 368, 374. *Taylor v. Carryl*, 20 How. 583. *Buck v. Colbath*, 3 Wallace, 334, 341. *Hagan v. Lucas*, 10 Pet. 400. The assignees disclaim all right to the earnings. The facts offered to be proved were immaterial and inadmissible.

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*B. R. Curtis & R. H. Dana, Jr.*, for the Adams Express Company. The leading purpose of the indenture between the Boston, Hartford & Erie Railroad Company and the trustees, was that the railroad business should be carried on. It puts no limits on the power of those who are to conduct it. If the trustees should come into possession, the leading purpose continues. The property, franchise and contracts vest in the trustees, but still in trust. It is a public franchise, and must be exercised for the public benefit. The indenture creates a trust and agency *sui generis* in its character. The trustees, when in possession, are agents of both the railroad corporation and their creditors. *Blennerhassett v. Day*, 2 Ball & Beat. 132. As agents of the former, they cannot repudiate their contract with the Adams Express Company; it passed to them as much as did the lease with the Norwich & Worcester Railroad Company. The indenture is not a mortgage or a pledge. It, as well as the bonds, was executed and delivered upon certain "terms, conditions and agreements" precedent; the first of which was, that the corporation should have the possession and control, the power to make usual contracts, and, with the coöperation of the trustees, the power of sale. The corporation, therefore, was not in possession and control as licensee or tenant of a mortgagee; but upon the fundamental condition precedent of the entire indenture. The powers of the trustees, when in possession for foreclosure, are not derived from, measured by, or analogous to, the powers of a mortgagee in possession. They are to be drawn from and measured by the instrument itself. One overruling general provision is, that in respect to the operation of the road, and the collection of the income, they are to do as the corporation could do and ought to do. The true character of the indenture is, that it is a trust hypothecation by the corporation, with elements of agency and representation conferred by sanction of the state upon the trustees temporarily and conditionally; the two paramount terms being, first, that the railroad business shall be carried on in the usual manner as a public duty and a private right by the corporation, and, in a certain event, by the trustees, secondly, that, so far as consistent with the first term, the debts of the prospective creditors shall be paid.

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Even in the case of a strict mortgage of real estate, the tendency has been to sustain, as far as possible, the right of the mortgagor and his assigns in the rents, and to sustain contracts, reasonable and *bonâ fide*, between the mortgagor and others, especially where their object is to carry on the business which is mortgaged, or involved in the mortgage. *Fay v. Cheney*, 14 Pick. 399, 403.

Although the mortgagee may have obtained a judgment for foreclosure, and the statute period may have expired, and the execution may have issued, and be in the hands of the officer, the rights of the mortgagee to rents and profits are no greater than if there had been no breach of condition. *Field v. Swan*, 10 Met. 112. *Huntington v. Smith*, 4 Conn. 235. *Eaton v. Whiting*, 3 Pick. 484. *Glass v. Ellison*, 9 N. H. 69. *Wilder v. Houghton*, 1 Pick. 87. *Mayo v. Fletcher*, 14 Pick. 525. *Woodward v. Pickett*, 8 Gray, 617. *Wright v. Lake*, 30 Verm. 206. *Parkhurst v. Northern Central Railroad Co.* 19 Maryl. 472. *Syracuse City Bank v. Tallman*, 31 Barb. 201. *Cooper v. Davis*, 15 Conn. 556. *Haven v. Adams*, 8 Allen, 363. So in case of a judgment creditor. *Bissell v. Payn*, 20 Johns. 3. *Rich v. Baker*, 3 Denio, 79.

In strict mortgages of real estate, leases do not subsist against a mortgagee in possession, because they are an estate in the land, created in derogation of his fee; and for the further reason that the lessee may redeem. *Haven v. Adams*, 4 Allen, 80, 93, and 8 Allen, 363. *Haven v. Boston & Worcester Railroad Co.* 3 Allen, 369. *Bacon v. Bowdoin*, 22 Pick. 401. *Loud v. Lane*, 8 Met. 517. So the holder of a bond to convey may redeem, if entitled to specific performance. *Lowry v. Tew*, 3 Barb. Ch. 407.

The analogies of strict mortgages of real estate, which disregard certain rights and equities of third persons who have made prospective contracts with a mortgagor, as against a mortgagee in possession, do not control the present case. And this, not only because the present is a contract *sui generis*, and not a mortgage strictly speaking, but because its purposes and nature imply the right and power of whoever shall be in possession and control of the road, whether the corporation or the trustees, to make such a

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contract as the present, valid against everything but the termination of the railroad business by the provisions of the indenture, either on the expiration of the right of redemption, or the conveyance from the trustees to the new corporation. As the corporation, or its assignees in bankruptcy, or any person having a sufficient equitable interest, may redeem within the eighteen months, and the present default is in the payment, not of the principal but of interest only; and as, in the event of payment of interest, the corporation is reinstated *ipso facto*, and bound by this contract, it will be unreasonable and inequitable to terminate the contract simply because the trustees are in temporary and contingent possession.

The advance of \$200,000 was, in the view of a court of equity, a prepayment for transportation to be furnished. The provision for the continuance of the contract beyond the five years, if necessary for that purpose, favors that view, and it is not affected by the fact that the corporation gave its notes and some collateral security; for the ability of the road to perform its part of the contract was necessarily contingent.

At any rate, so long as the corporation was in possession and control, the contract must be held to have been binding, and before August 17, 1871, the business must be considered as done by the corporation. The receivers were simply officers of the court; they represented neither the corporation nor the bondholders, but whomsoever it might concern. They were the official stakeholders, with an obligation to keep the stake, namely, the property, business and contracts, in condition, and restore it as nearly as possible *in statu quo ante*. *Booth v. Clark*, 17 How. 322. *Wiswall v. Sampson*, 14 How. 52, 65. *Ryckman v. Parkins*, 5 Paige, 543. *Davis v. Marlborough*, 2 Swanst. 108, 118. *In re Colvin*, 3 Maryl. Ch. 278. *Neate v. Pink*, 3 Macn. & Gord. 476. *Hutchinson v. Massareene*, 2 Ball & Beat. 49, 55. *Sharp v. Carter*, 3 P. W. 375, 379. *Boehm v. Wood*, Turn. & Russ. 332, 345. *Ellicott v. Warford*, 4 Maryl. 80. *Phinnery v. Evans*, 11 H. L. Cas. 115. The receivers have no remaining rights or equities. They were fully paid and secured, as a condition precedent to the possession by the trustees. The trustees claim that whatever the



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receivers demand by their petition really belongs to the trustees. It clearly belongs to them, if to either; and if the receivers collect it, it is only as the agents of the trustees. That is a capacity they were never appointed to fill, and unknown to the court in this proceeding. If no receivers had been appointed, and the trustees had, on demand, received possession directly from the corporation, as provided for in the indenture, on August 17, 1871, they could not have required the Adams Express Company to pay them for facilities furnished by the corporation before that date.

The Norwich & Worcester Railroad Company and the Norwich & New York Transportation Company cannot claim cash payments from the Adams Express Company, or demand anything in derogation of their right to hold the forty per cent. for the repayment of their advance.

*R. R. Bishop*, for the trustees. There is no privity of estate or contract between the Adams Express Company and the trustees. The case is parallel to that between a mortgagee and tenant under a lease granted by the mortgagor after the mortgage. *Massachusetts Hospital Insurance Co. v. Wilson*, 10 Met. 126. *Russell v. Allen*, 2 Allen, 42, 44. *Brown v. Storey*, 1 Scott N. R. 9, 16. *Smith v. Shepard*, 15 Pick. 147. *Fitchburg Cotton Manufacturing Co. v. Melven*, 15 Mass. 268. *Waddilove v. Barnett*, 2 Bing. N. C. 538. Notes to *Moss v. Gallimore*, 1 Smith Lead. Cas. (6th Am. ed.) 843, 849. *Doe v. Bucknell*, 8 C. & P. 566.

To fulfil the contract set up by the Adams Express Company would be to apply the property and earnings of the road to the payment of their debt in preference to all others, and in preference to the prior mortgage debt represented by the trustees. *Brown v. New York & Erie Railroad Co.* 19 How. Pract. 84. Any person claiming under a contract relating to a mortgaged estate, made after the mortgage, without privity of the mortgagee, must claim subject to the mortgage. *Rogers v. Humphreys*, 4 Ad. & El. 299, 313. *Keech v. Hall*, 1 Doug. 21. *Haven v. Adams*, 4 Allen, 80. *Haven v. Boston & Worcester Railroad Co.* 8 Allen, 363, 369. *Henshaw v. Wells*, 9 Humph. 568. *Jackson v. Fuller*, 4 Johns. 215. *Jackson v. Chase*, 2 Johns. 84. *Crosby v. Harlow*, 21 Maine, 499.

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If the petitioners have lent money to the owner of an equity of redemption, the law provides them relief in another form. They should redeem. General creditors may redeem, in certain instances, as well as subsequent incumbrancers; and the general creditors of a bankrupt may redeem from his mortgages, first calling upon the assignees to do so. *Francklyn v. Fern*, Barnard. Ch. 30, 32; *S. C. 2 Eq. Cas. Ab.* 605. *Keech v. Hall*, 1 Doug. 21. *Bacon v. Bowdoin*, 22 Pick. 401. The bankruptcy of the mortgagor cannot change the priorities of the different classes of creditors, or lessen the rights of mortgagees in possession to the rents and profits.

The alleged facts, offered to be proved as to the Norwich & Worcester Railroad Company and the Norwich & New York Transportation Company, afford no ground for the injunction prayed for. It is immaterial what the terms of a contract were, by which the trustees are not bound. Nor can the petition be supported as in any sense a garnishment of any sums due for rent, or otherwise, from the trustees to the Norwich & Worcester Railroad Company, or the Norwich & New York Transportation Company. These companies are not made parties to this proceeding, and the trustees would have no authority to offset against them any sum which the Adams Express Company should be allowed to retain. If the Adams Express Company have any claim against the Norwich & Worcester Railroad Company, or the Norwich & New York Transportation Company, they have a perfect remedy at law. Both companies are solvent, and able to respond.

WELLS, J. The receivers having, in pursuance of the decision and order of this court, delivered the possession of the railroad and all other property of the corporation into the hands of the trustees under the mortgage, it becomes proper and necessary for the court to direct what disposition shall be made of the earnings of the road, while managed by the receivers, in transporting freight for the Adams Express Company; or what compensation shall be rendered for that service, and in what mode.

No claim is now made, by either party, that a different rate of compensation should be allowed from that provided for by the

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contract between the Adams Express Company and the corporation. The share of earnings that would be due to the corporation, under that contract, is set forth in detail by months, and no objection is made to the correctness of that statement.

The decree, appointing receivers, gave no priority or superiority of right to the parties upon whose application or in whose behalf it was made. Story Eq. § 829. Adams Eq. 355. It had no effect to change the title, or create any lien upon the property. Its purpose, like that of an injunction *pendente lite*, was merely to preserve the property until the rights of all parties could be adjudged. The receivers are officers of the court for this purpose, and act under its direction and control. They continue the operation of the road and the conduct of its business, because this is essential to its proper preservation. They may fulfil the contracts of the corporation so far as beneficial. They may not pay its debts, nor fulfil contracts which are burdensome, or tend to diminish the value of the property in their control, unless such contracts are charged as incumbrances upon the property, or are necessary to its proper preservation and security. They are entitled to repayment of their reasonable expenses and charges, in preference to all other claims upon the property, of whatever nature.

As these proceedings were originally commenced in behalf of the bondholders, after breach of the condition of the mortgage, and for the purpose of foreclosing the same; and as the court has decided that they were entitled to have the mortgage foreclosed, and has ordered possession to be delivered to the trustees for that purpose, it is contended that the taking of possession by the receivers was the commencement of a judicial foreclosure; that it was equivalent to an entry by the mortgagees; or was at least a possession in their behalf and for their use and benefit. The trustees are now party to the proceedings, and have been heard in support of this claim.

The question of the right of the mortgagees to the income of the property, during the pendency of the proceedings by which they have been put into its possession, must be determined by the provisions of the mortgage. It is that alone which can give them any priority.

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By that instrument it is provided "that the actual possession, use, management and control of all the granted premises, shall remain with the parties of the first part [the corporation] so long as the said mortgage bonds shall remain without default or forfeiture." It is further provided "that in case default be made by said company in payment of any moneys, either principal or interest, secured hereby, (the default continuing for six months,) the said company shall, on demand of the trustees or trustee for the time being, or his or their agent, authorized thereto in writing, deliver to said trustees or trustee, or his or their agent, the actual possession of all the herein granted premises, and thereupon the said parties of the second part shall and may, by themselves, their officers, agents and employees, take, receive and operate the said railroad, franchises and other property and estate hereby conveyed, and collect, receive and have the rents, income and profits thereof, as fully as the party of the first part could do if no default had been made." Also as follows: "On taking possession as aforesaid, the said trustees shall file in the office of the secretaries of state of the states of Massachusetts, Rhode Island, Connecticut and New York, a written notice, acknowledged before a notary public, that they have taken possession of said mortgaged property, franchises and estate, for default in the payment of principal or interest, or both, as the same may be, and of their purpose to foreclose the said mortgage for said default."

The terms of the mortgage being thus explicit in regard to the mode in which the trustees may reach and control the use of the corporate property and franchises, and appropriate the income thereof, we do not think that any lien or priority of claim upon the income of the road can be acquired by them in any other mode.

Another clause in the mortgage is pressed upon our consideration. It is as follows: "The remedy herein given to said parties of the second part shall not be construed to deprive them or any other parties of their full rights and remedies in the several courts of law and equity in said states, as they exist now or may hereafter exist, and any court of competent jurisdiction may enforce any of the provisions of this instrument."

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Whether this provision would authorize a foreclosure and sale of the property and franchises of the corporation, for the benefit of the bondholders, without the intervention of the trustees provided for in the mortgage; and whether, in such case, the income, from the time the receivers took possession, would be treated as incident to and a part of the fund distributable to the mortgagees or bondholders, we need not determine; because these proceedings have not been conducted to that result. The suit having been directed to, and having resulted in possession by the trustees, for the purposes of a foreclosure *in pais*, in pursuance of the provisions of the mortgage first quoted, the effect upon the rights of all parties must be determined accordingly. The lien of the mortgagees attaches to the income only from the time of thus taking possession of the corporate property and franchises.

Against the claim of the receivers to collect these earnings of the road from the Adams Express Company in order to apply the money to the payment of their expenses and charges in operating the road, it is answered that those expenses and charges have already been paid to them by the trustees. This is a sufficient answer to the claim, so far as it concerns the receivers personally. But as officers of the court, representing the interests of all parties, their claim is not at all affected by such payment. The trustees made the payment as an advance, under the order and direction of the court, for the protection of the receivers from personal loss and responsibility. This was necessary in order to bring the operations of the receivers to a close; and on account of the delay required for adjustment of the various claims growing out of those operations, and for the final settlement of their accounts. But the trustees are entitled to have those claims adjusted, and those accounts settled, precisely as if no such advance had been made by them; and to be indemnified for the amount thus paid by them, so far as it was applied to expenses and charges in managing the ordinary business of the corporation while in the hands of the receivers. So far as it was applied to the repayment of advances made or liabilities incurred by the receivers for permanent improvements, or for securing rights or advantages for the benefit of the principal property and franchises,

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covered by the mortgage, the trustees have their indemnity in the advantages thus secured, and have no priority of claim upon the previous earnings of the road for its repayment.

It was decided at the former hearing, that the contract with the Adams Express Company gave them no lien upon the property or rights of the corporation; that the receivers were under no obligation to fulfil it, either by performing the service stipulated for, or by applying any earnings of the road, while managed by them, to the payment of the debt of the corporation. But as the receivers were acting only provisionally, they were directed to continue the performance of the service as required by the contract, upon receiving security for the payment of proper compensation therefor, if and as it should ultimately be ordered by the court. The receivers have no interest in requiring that compensation to be made, except for the repayment of their expenses and charges. If not needed for that purpose, they have no occasion to interfere with the application of those earnings in the manner provided for in the contract, unless some other right is shown, superior to that of the Adams Express Company under the contract, which requires that the fund be administered upon by the court.

The corporation has no such right. The general creditors are not parties to the suit; and it is not instituted in their behalf or for their benefit. It does not partake, in any degree, of the nature of a proceeding in insolvency. As already shown, the bondholders and the trustees under the mortgage have no lien upon these earnings, and no priority of claim upon them.

But it appears that, shortly after the receivers took possession, the corporation was adjudged bankrupt under the laws of the United States, and, in pursuance of those laws, all its property, rights and franchises were conveyed to assignees appointed for that purpose. All parties interested having acquiesced in that adjudication, and no question being made here as to the application of the bankrupt laws of the United States to such corporations, we must regard those proceedings as valid and binding upon the rights of all parties for the purposes of this case. The assignees have appeared to represent their interests in the subject

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matter of the controversy, and have assented that the fund be ordered to be paid over to the receivers.

The effect of the assignment was to transfer to the assignees all rights of the corporation, leaving all its unsecured obligations to be adjusted alike, and entitled only to their proportionate share in the final distribution. But for the possession by this court through its receivers, the assignees would have had possession of the road, and would have taken all its earnings, without any obligation or right to apply any portion of them to the debt of the Adams Express Company as provided by their contract. The right being thus in the assignees, the court is bound to recognize and give effect to that right, in directing the action of its receivers, and in disposing of the fund.

The right to redeem the property from the mortgage is in the assignees. Payment of this fund to the trustees through the receivers will enure to the benefit of the assignees by reducing *pro tanto* the mortgage debt. The court, having control of the fund, and its custody, constructively, is bound to make that disposition of it which is required by the parties having the superior right.

The receivers therefore will be required to collect, for the use and benefit of the mortgagees, so far as not required for their own expenses and charges remaining unpaid, all earnings of the road from the time the assignment in bankruptcy took effect. That date is said to be October 20, 1870.

As to the earnings of the road, under this contract, prior to that date, if the receivers did not derive, from other sources of income, an amount sufficient to cover their expenses and charges in operating the road and managing the business of the corporation, they will be entitled to receive from these earnings such sum as will make up the deficiency during that period; or to collect the whole, if it does not exceed that deficiency. No other ground of claim to the earnings prior to October 20, 1870, appears to us to have been maintained by any party.

The evidence offered to show that the Adams Express Company were induced to enter into the contract, and to make the large loan of money to the Boston, Hartford and Erie Railroad Company, by certain representations of the Norwich & Worcester

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Railroad Company and of the Norwich & New York Transportation Company, to the effect that they could safely enter into that contract and make such loan, could not affect any of the questions under consideration. Even if those corporations were bound or estopped by the statements made by their officers, there is nothing alleged, or offered to be proved, which would entitle the Adams Express Company to any set-off or recoupment here. It is not shown nor alleged that those corporations have refused to transport express freight as stipulated by the contract it should be done; nor that the Adams Express Company have paid any money or are liable to pay any for such transportation; nor that the performance of the contract on the part of the Boston, Hartford & Erie Railroad Company, and of the receivers, has in any respect failed by reason of any inability or want of authority on their part to contract for and to furnish the requisite facilities for transportation over the whole line to New York.

We do not understand that this claim is made upon the ground of false representations as to the solvency or credit of the Boston, Hartford & Erie Railroad Company. It is not alleged that the statements were in writing; without which they would not avail.

If any claim on account of such representations could be maintained against either of those other corporations, it is too far collateral to this contract to constitute any defence, either in whole or in part.

By the lease of the Norwich & Worcester Railroad, which the receivers assumed, they controlled the entire transportation through to New York; and were thus enabled to furnish and did furnish to the Adams Express Company the full extent of service stipulated for by the contract. In neither contract is the consideration or compensation apportionable. No part of that which is to be rendered by the Adams Express Company to the Boston, Hartford & Erie Railroad Company is specifically applicable to the transportation over the other two lines; and no part of that which is rendered by the Boston, Hartford & Erie Railroad Company, or by the receivers, to the Norwich & Worcester Railroad Company, is specifically for receipts from transportation of express freights. What precisely are the arrangements with the



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Norwich & New York Transportation Company does not appear.

The proposed proofs therefore furnish no ground, either for apportioning the sums due to the receivers under the contract, or for directing them to retain, for the benefit of the Adams Express Company, or to withhold payment of any portion of the sums payable to the other two corporations on account of transportation of express matter over those lines.

For the purpose of determining whether the receivers are entitled to collect any portion of the earnings of the road, under the contract, prior to October 20, 1870, and if so. how much, the case will stand for hearing before a master ; unless the matter shall be otherwise adjusted by the parties. The earnings for the month of October are also to be apportioned. The amount to which the receivers are entitled being thus determined, a decree will be entered for its payment.

*Ordered accordingly.*

The petition of the Adams Express Company against the trustees presents questions in some respects differing from those presented as against the receivers. The trustees are not officers of the court, and do not act under its direction. Their possession and right of possession are confirmed by the decree of the court. But beyond that they stand upon their own rights as mortgagees. For the extent and measure of those rights the instrument of mortgage is the guide.

The petitioners deny that that instrument is, in its legal construction and effect, a mortgage. By its form and terms it professes to be a mortgage ; and it is executed and recorded as such. It is made in accordance with legislative authority, specially given for the purpose, to secure the bonds of the corporation. We cannot doubt that it should be construed according to the manifest intent and purpose, both of the parties and of the legislature ; and have effect to convey the legal title to the property and the rights which it describes. It is not the less a mortgage that it applies to property both real and personal, corporeal and incorporeal.

But if it were not a mortgage strictly, in legal effect, the court would, in equity, give it such operation as would secure the rights

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of the bondholders according to the obvious purpose of the instrument. Adams Eq. 122.

The contract of the petitioners confers no rights which attach by way of lien upon the property or franchises of the corporation. If it were otherwise, as it was made subsequent to, and with full notice of the mortgage, it must be held subordinate to that incumbrance. Against the mortgagees, or against the property of the corporation in their rightful possession, it could have no force, unless the mortgage by its terms reserved to the corporation the power to make contracts, in respect to the conduct of its business, which should be binding upon the mortgagees.

It is contended that the mortgage does reserve such a power, or rather, that it is implied from the terms of the mortgage and the nature of the rights which are transferred by its operation. The argument is, that the mortgage contemplates the transfer, not only of property and franchises, but also of the current business of the corporation; that such business implies continuance of operations, services and relations entered upon under contracts previously made. It is urged that the trustees, when they enter for breach of condition, take up the business of the corporation, without interruption, as they find it organized by the previous action of the corporation, with the arrangements and contracts incident to it; that this involves, almost necessarily, the execution by the mortgagees of contracts previously made by the corporation; and that, from the nature of the case, all contracts which are incident to and reasonably necessary or proper for the establishment and maintenance of such business must be within the authority of the mortgagors, while retaining control of the property, to make for the future as well as the present operation of the road.

If this were to be conceded, so far as relates to the mode of conducting the operations of the road, and the rates of compensation for service, it would fall short of the requirements of the case of the petitioners. To hold the mortgagees bound to render service without compensation, on the ground of a contract therefor and prepayment to the mortgagors, would involve the right of the mortgagors to defeat entirely the security thus given, by depriving the property of its capacity to yield available income.

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But we do not think the first position is maintainable. The mortgagees, upon entering into possession, do indeed take the business of the corporation already organized under contracts made by the mortgagors. The continuance of that business is the continuance of the arrangements and contracts under which it is conducted, and those contracts are carried forward by implication and the acquiescence of the mortgagees. It is a matter of practical expediency. But it is the acquiescence of the parties, and not the obligation of the contract itself, which thus continues it in operation. The title and right of the mortgagees are superior to those of the mortgagor, and cannot be bound by the contracts of the mortgagor unless authority therefor is given or reserved in explicit terms. We find no such terms in the mortgage itself; and we see nothing in the nature of the business of a railroad corporation, which necessarily involves such an implied authority. The case is not, in this respect, unlike that of real estate, the ordinary income of which is derivable from its occupation by many tenants paying rent. The mortgagee, entering in the middle of a quarter, may permit the tenants to remain until the rents are due, when he may collect the rents for the whole quarter, receiving thus the benefit of the contracts of the mortgagor. It would probably be for the interests of both that the contracts of the mortgagor should thus be adopted by the mortgagee. But no authority to make leases, binding upon the mortgagee, could be implied from the reasonableness or the probable advantages of such contracts. If the mortgagor should undertake to bind the estate by a lease in which the rent for the whole term was paid in advance, there would be no doubt of his incapacity so to do, as against the mortgagee taking possession.

The principle seems to us to be the same in the two cases. The mortgagee, coming in by a superior title, takes the subject of his mortgage clear of all obligations contracted by the mortgagor, whether personal to himself or relating to his management of the property. If he continues in operation the arrangements of the mortgagor, or fulfils or accepts the fulfilment of contracts previously made, they become binding upon him only so far as he adopts them and because he has adopted them. He is not per

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sonally bound, nor is the property in his hands chargeable otherwise.

We are satisfied that it was the right of the trustees to refuse all performance or recognition of the contract of the petitioners with the corporation, and to require not only payment of compensation for transporting their freights, but that the rate of compensation and terms of the service should be subject to a new arrangement, as if no contract had existed.

The right of the mortgagees is an absolute one. There is no contingency which would justify the court in interfering to enable the petitioners to give security for the payment of such sum only as shall be found to be necessary for the payment of interest in arrear upon the bonds. The mortgagees are entitled to the whole property and all its income, until payment has been made in fact. *Gooding v. Shea*, 103 Mass. 360. It is a legal right which cannot be limited. Neither the equity nor the facts of the case warrant any such disposition of it.

The parties must be remitted to their legal rights.

*Petition dismissed.*

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EXCHANGE BANK OF ST. LOUIS *vs.* GEORGE W. RICE  
& another.

A merchant consigned twelve bales of cotton to a factor, and on the same day drew a bill of exchange upon him, expressed on its face to be drawn "against twelve bales of cotton," procured its discount by a bank, and advised the factor of the consignment and the draft. Upon presentment of the draft, the factor refused to accept it, and advised the merchant by letter that he did so because he had not received the bill of lading of the cotton, and that he would accept the draft when the bill was received. Two days later, he received the bill; and a few days afterwards, the bank, to which his letter had meanwhile been shown, again presented the draft to him, together with his letter and a duplicate bill of lading, and requested his acceptance, which he again refused. Upon the subsequent receipt of the cotton, the factor sold it, and credited its proceeds to the merchant, who was his debtor to a larger amount. *Held*, that the bank could not maintain an action against the factor, either upon his promise to accept the draft, or for the proceeds of the cotton.

CONTRACT. After the decision reported 98 Mass. 288, the parties stated the case as follows for the judgment of the superior court :

"On March 8, 1865, John P. Hill, at St. Louis, drew on the defendants, commission merchants in Boston, a draft for \$3300, payable thirty days after date to the order of R. R. Pitman & Company, and containing on its face a memorandum in the terms following: 'against 12 bales cotton.' On the same day the draft was indorsed to and discounted in the usual course of business by the plaintiffs, and on March 15 was presented by them to the defendants at Boston, who caused it to be noted for non-acceptance. On March 8 Hill wrote to the defendants as follows: 'I ship you to-day per Merritt's Express 12 bales, weighing 5489 pounds, on which I have drawn on you @ 30 days for \$3300.' To this letter the defendants replied on March 14 as follows: 'We now have the pleasure to acknowledge your favor of the 8th. Your shipment 12 bales cotton per Merritt's Express will receive due attention. Bill of lading not at hand. Your draft for \$3300 is excessive; particularly as we shall have no margin on previous shipments, as the market now looks. We will honor the same, but shall expect you, on receipt of this, to make us shipment of cotton to cover the margin.' And on March 15 they again wrote to Hill as follows: 'Market for cotton continues weak. Have no bill lading 12 bales reported as shipped yesterday, and we have felt obliged therefore to have your draft for \$3300 noted for non-acceptance. When bill lading is received, will accept draft.' The said bill of lading of the cotton ran to the defendants or order, and was received by them March 17, 1865.

"The defendants' letter of March 15 was shown to the plaintiffs by R. R. Pitman & Company March 22, 1865. The plaintiffs thereupon procured said letter, and the duplicate bill of lading, of Pitman & Company, and on March 27 again presented the draft, with the defendants' said letter and the duplicate bill of lading attached, to the defendants for acceptance. But the defendants declined to accept the same, and afterwards declined to pay, and they have never paid the same or any part thereof, and the same was duly protested for non-acceptance and non-payment. The twelve bales of cotton were received by the defendants on April 17, and were sold by them on April 21 for \$1349 net, which sum they credited in their current account with:

Hill, upon which a balance then was and still is due to the defendants."

The superior court ordered judgment for the defendants; and the plaintiffs appealed. The case was argued at a former term.

*B. F. Thomas & R. Olney*, for the plaintiffs. 1. At the same time that Hill notified the defendants of his consignment of the cotton to them, he informed them that he had drawn against it the draft in suit. This made the acceptance of the draft a condition of the consignment, and bound the cotton and draft indissolubly together. The defendants' letters of the 14th and 15th of March, wherein they promise to accept when the bill of lading is received, show that this was their understanding of the transaction. And not only was this the real transaction, as between the immediate parties; but, by a memorandum on the face of the draft, any party into whose hands it should come was informed and assured that its acceptance and payment were secured by the consignment of the cotton. The plaintiffs bought the draft with the memorandum on it, and in reliance and with a right to rely upon the cotton as security for its payment; and before the bill of lading was received the draft was presented to the defendants, who thus became aware that the plaintiffs were the holders of it and had purchased on faith of its acceptance and payment being secured by the cotton. Under these circumstances, the defendants could not accept the consignment without also accepting the draft. They might decline the consignment and then also decline to accept the draft. But they could not receive the consignment and at the same time dishonor the draft, without a manifest fraud upon both the consignor and the holder. The case of *Allen v. Williams*, 12 Pick. 297, proceeds substantially on these principles. The fact of the bill of lading in the present case not running to the bearer, but directly to the defendants, is material only on the question of the technical legal title. The equitable obligation to accept and pay is the same. See 1 Parsons on Notes & Bills, 291; *Michigan State Bank v. Gardner*, 15 Gray, 362.

2. Upon the facts, the defendants made a distinct promise to accept, conditional on receipt of the bill of lading. That condi-

tion being fulfilled, the promise became absolute. Though in terms it was a promise to the drawer, in law it enured to the benefit of the holder, on the principle affirmed in *Carnegie v. Morrison*, 2 Met. 381, which is, "that when one person, for a valuable consideration, engages with another, by simple contract, to do some act for the benefit of a third, the latter, who would enjoy the benefit of the act, may maintain an action for the breach of such engagement." *Brewer v. Dyer*, 7 Cush. 337, 340. And the case is within the English as well as the American rule, inasmuch as the defendants expressly assented to the terms upon which the cotton was consigned to them, and promised Hill, who may be deemed the plaintiffs' agent to receive the promise, to accept upon receipt of the bill of lading. See *Lilly v. Hays*, 5 Ad. & El. 548; *Walker v. Rostron*, 9 M. & W. 411; Chit. Con. (8th ed.) 53; Addison on Con. (5th ed.) 633, 634, 951; Met. Con. 209. By a compliance with the promise, on the part of the defendants, the plaintiffs would have received the full amount of the draft, and by the refusal of compliance they are damnified to the same amount, and are further entitled to interest as damages for the detention.

3. The consideration for the defendants' agreement to accept moved from the plaintiffs. The plaintiffs had an equitable lien upon the cotton to the extent of the draft discounted by them. The promise of the defendants to accept was on condition that they received the bill of lading of cotton of which the plaintiffs were thus the equitable owners. And the defendants received the bill of lading, and then sold the cotton, with knowledge of the interest of the plaintiffs in it. Under any rule, therefore, the promise was to the plaintiffs, and they may count upon it.

4. If the plaintiffs are not entitled to recover the amount of the draft and interest, they are at least entitled to judgment for the amount of the proceeds of the cotton, with interest from April 17, 1865. The defendants took the cotton impressed with a trust for the plaintiffs as holders of the draft, and held and now hold its proceeds to the plaintiffs' use. *Allen v. Williams*, 12 Pick. 297.

*H. W. Paine & R. D. Smith*, for the defendants.

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GRAY, J. It has already been decided in this case, upon proof of substantially the same facts which are now agreed by the parties, that the plaintiffs could not sue the defendants as acceptors of the draft; because their promise to the drawer to accept it, having been made after the draft had been negotiated to the plaintiffs, did not amount to an acceptance; and the memorandum at the foot of the draft, that it was drawn against twelve bales of cotton, could have no more effect to charge the defendants as acceptors than the mere signature of the drawer, which of itself always imports a promise that he will have funds in the hands of the drawee to meet the draft. 98 Mass. 288.

The defendants' promise to the drawer to accept the draft was a mere chose in action, not negotiable, and upon which no one but he to whom it was made could maintain an action. *Worcester Bank v. Wells*, 8 Met. 107. *Luff v. Pope*, 5 Hill, 413, and 7 Hill, 577.

The general rule of law is, that a person who is not a party to a simple contract, and from whom no consideration moves, cannot sue on the contract, and consequently that a promise made by one person to another, for the benefit of a third person who is a stranger to the consideration, will not support an action by the latter. And the recent decisions in this Commonwealth and in England have tended to uphold the rule and to narrow the exceptions to it.

The unguarded expressions of Chief Justice Shaw in *Carnegie v. Morrison*, 2 Met. 381, and Mr. Justice Bigelow in *Brewer v. Dyer*, 7 Cush. 337, to the contrary, on which the learned counsel for the plaintiffs relied at the argument, were afterwards, and while those two distinguished judges continued to hold seats upon this bench, qualified, the limits of the doctrine defined, and a disinclination repeatedly expressed to admit new exceptions to the general rule, in unanimous judgments of the court, drawn up by Mr. Justice Metcalf, and marked by his characteristic legal learning and cautious precision of statement. *Mellen v. Whipple*, 1 Gray, 317. *Millard v. Baldwin*, 3 Gray, 484. *Field v. Crawford*, 6 Gray, 116. *Dow v. Clark*, 7 Gray, 198. Those judgments have since been treated as settling the law of Massachusetts



upon this subject. *Colburn v. Phillips*, 13 Gray, 64. *Flint v. Pierce*, 99 Mass. 68.

The first and principal exception, stated by Mr. Justice Metcalf, to the general rule, consists of those cases in which the defendant has in his hands money which in equity and good conscience belongs to the plaintiff, as where one person receives from another money or property as a fund from which certain creditors of the depositor are to be paid, and promises, either expressly, or by implication from his acceptance of the money or property without objection to the terms on which it is delivered to him, to pay such creditors. That class of cases, as was pointed out in 1 Gray, 322, includes *Carnegie v. Morrison* and most of the earlier cases in this Commonwealth; as well as the later cases of *Frost v. Gage*, 1 Allen, 262, and *Putnam v. Field*, 103 Mass. 556.

The only illustration, which the decisions of this court afford, of Mr. Justice Metcalf's second class of exceptions, is *Felton v. Dickinson*, 10 Mass. 287, in which it was held, in accordance with a number of early English authorities, and hardly argued against, that a son might sue upon a promise made for his benefit to his father. Those cases, with the proposition on which they have sometimes been supposed to rest, that, by reason of the near relation between parent and child, the latter might be thought to have an interest in the consideration and the contract, and the former to have entered into the contract as his agent, are not now law in England. *Tweddle v. Atkinson*, 1 B. & S. 393. Addison on Con. (6th ed.) 1040. Dicey on Parties, 84. And this case does not require us to consider whether they ought still to be followed here.

The third exception, admitted by Mr. Justice Metcalf, is the case of *Brewer v. Dyer*, 7 Cush. 337, in which the defendant made a written promise to the lessee of a shop to take his lease (which was under seal) and pay the rent to the lessor according to its terms, entered into possession of the shop with the lessor's knowledge, paid him the rent quarterly for a year, and then before the expiration of the lease left the shop, and was held liable to an action by the lessor for the rent subsequently accruing. That case may perhaps be supported on the ground that

such payment and receipt of the rent after the agreement between the defendant and the lessee warranted the inference of a direct promise by the defendant to the lessor to pay the rent to him for the residue of the term. See *McFarlan v. Watson*, 3 Comst. 286. It certainly cannot be reconciled with the later authorities, without limiting it to its own special circumstances, and affords no safe guide in the decision of the present case.

The plaintiffs are then obliged to fall back upon the first exception to the general rule. But they fail to bring their case within that exception, or within any of the authorities to which they have referred us.

In *Carnegie v. Morrison*, 2 Met. 381, the defendants, having funds in cash or credit of the plaintiffs' debtor, gave him a letter of credit, which was shown to the plaintiffs, and on the faith of which they drew the bill, for the amount of which they sued the defendants; and the drawing of that bill, whereby they made themselves liable to the drawee thereof, was a consideration moving from them. In *Lilly v. Hays*, 5 Ad. & El. 548; *S. C.* 1 Nev. & Per. 26; the defendant, as the jury found, had authorized the plaintiff to be told that the defendant had received the money to his use, and thus promised the plaintiff to pay it to him. So in *Walker v. Rostron*, 9 M. & W. 411, the defendant had promised the plaintiff to pay the sum in question. And the rule established by the modern cases in England, as laid down in the text books cited for the plaintiffs, does not permit the person, for whose benefit a promise is made to another person from whom the only consideration moves, to maintain an action against the promisor, unless either the latter has also made an express promise to the plaintiff, or the promisee acted as the plaintiff's agent merely. Met. Con. 209. Addison on Con. (6th ed.) 630, 1041. Chit. Con. (8th ed.) 53. Where the promisee is in fact acting as the agent of a third person, although that is unknown to the promisor, the principal is the real party to the contract, and may therefore sue in his own name on the promise made to his agent. *Sims v. Bond*, 5 B. & Ad. 389; *S. C.* 2 Nev. & Man. 608. *Huntington v. Knox*, 7 Cush. 371. *Barry v. Page*, 10 Gray, 398. *Hunter v. Giddings*, 97 Mass. 41. *Ford v. Williams*, 21 How. 287

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In the case at bar, the plaintiffs had acquired no title in the cotton against which the draft was drawn. The bill of lading was not attached to the draft, or made payable to the holder thereof, or delivered to the plaintiffs. The case is thus distinguished from *Allen v. Williams*, 12 Pick. 297, and *Michigan State Bank v. Gardner*, 15 Gray, 362, cited at the argument. The cotton was not of sufficient value to pay the draft, and the balance of account between the defendants and the drawer, at the time of their receipt and sale of the cotton, and ever since, was in favor of the defendants. There is no ground therefore for implying a promise from the defendants to the plaintiffs to pay to them either the amount of the draft or the proceeds of the cotton. *Tiernan v. Jackson*, 5 Pet. 580. *Cowperthwaite v. Sheffield*, 1 Sandf. 416, and 3 Comst. 243. *Winter v. Drury*, 1 Selden, 525. *Yates v. Bell*, 3 B. & Ald. 648. The plaintiffs did not take the draft, or make advances, upon the faith of any promise of the defendants, or of any actual receipt by them of the cotton or the bill of lading, but solely upon the faith of the drawer's signature and implied promise that the defendants should have funds to meet the draft. The whole consideration for the defendants' promise moved from the drawer and not from the plaintiffs. And the defendants made no promise to the plaintiffs. Their only promise to accept the draft was made to Hill, the drawer, after the draft had been negotiated to the plaintiffs; and there is no proof that the defendants authorized that promise to be shown to the plaintiffs, or that Hill, to whom that promise was made, was an agent of the plaintiffs. His relation to them was that of drawer and payee, not of agent and principal. To infer, as suggested in behalf of the plaintiffs, that he was their agent in receiving the defendants' promise, so that they might sue thereon in their own name, would be unsupported by any facts in the case, and would be an evasion of the rules of law, which will not allow any person, who took the draft before that promise was made, to maintain an action upon that promise, either as an acceptance or a promise to accept.

*Judgment for the defendants.*

FLAGG CARR *vs.* NATIONAL SECURITY BANK.

The promise of a bank to one of its depositors to pay all checks which he may draw does not make it liable to an action of contract by the holder of a check afterwards drawn by him for part of the amount deposited.

CONTRACT by the payee against the drawees, on a bank check. The declaration alleged that the defendants were a banking corporation of deposit, discount and circulation, doing business in Boston, and the firm of Lincoln & Company on and before May 1868 "were customers of and depositors in said bank, and had been accustomed to deposit money in said bank, and draw their checks upon the same, and said bank, in consideration that said firm would so deposit funds in said bank, promised and agreed with said firm to pay all checks and drafts of said firm on said bank, when in funds of said firm to pay the same, and said bank had for a long time previous to May 1868 so paid said drafts and checks of said firm;" that Lincoln & Company on May 2, 1868, in consideration of \$600 paid to them by the plaintiff, drew their check upon the defendants for the sum of \$600 payable to the plaintiff's order, and the plaintiff duly presented it to the defendants at their place of business, and demanded payment of it; that "at the time of the presentment and demand the defendants were indebted to said firm, and said firm had funds in the bank, against and upon which they were entitled to draw the check, to a greater amount than \$600;" but that the defendants refused to pay the check, and have never paid it or any part of it; and that the plaintiff continues to be the holder of the check, and no part of it has ever been paid to him, and he has never been able to collect it, or any part of it, from Lincoln & Company. A copy of the check was annexed.

The defendants demurred, on the ground that no legal cause of action was stated, because the declaration did not set forth any agreement, express or implied, of the defendants with the plaintiff, to pay the check. The superior court sustained the demurrer, and ordered judgment for the defendants; and the plaintiff appealed.

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 Carr v. National Security Bank.
 

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*J. G. Abbott*, (*T. F. Nutter* with him,) for the plaintiff. It is an open question in this Commonwealth, whether the holder of a check drawn on a bank can compel the bank to pay it to him by showing the bank has on deposit money of the drawer sufficient to pay it when demanded, and that the money was deposited upon an agreement of the bank with the depositor to pay it out upon his checks in such sums as he should thereby designate. This is a different question from that decided in *Bullard v. Randall*, 1 Gray, 605, and *Dana v. Third National Bank*, 13 Allen, 445.

The contract implied by law between a bank and its customer, and expressly alleged in this case and admitted by the demurrer, is that the bank will pay out the fund deposited to the holders of any checks drawn by the depositor, upon presentment. An action will lie against the bank in favor of the drawer of a check, for refusing, even by mistake, to pay it when demanded, if in funds. *Whitaker v. Bank of England*, 1 C., M. & R. 741. *Marzetti v. Williams*, 1 B. & Ad. 415. *Rolin v. Steward*, 14 C. B. 595. *In re Brown*, 2 Story, 502. *Harker v. Anderson*, 21 Wend. 372. *Little v. Phoenix Bank*, 2 Hill, 425.

It is also settled, that if one person puts money or other property into the hands of another, and in consideration thereof the receiver promises to pay money to a third person, the third person can maintain an action to recover the money so promised to be paid, although no promise has been made to him, and no privity proved to exist between himself and the promisor. *Arnold v. Lyman*, 17 Mass. 400. *Hall v. Marston*, Ib. 575. *Carnegie v. Morrison*, 2 Met. 381, 402. *Dutton v. Pool*, 1 T. Raym. 302. 22 Amer. Jur. 17. 2 Greenl. Ev. § 109. And this rule applies, although the promise is made to pay one to be designated at a future time by the person from whom the consideration moves; that is, to his order. *Weston v. Barker*, 12 Johns. 276. *Fenner v. Meares*, 2 W. Bl. 1269.

These principles of the law, applied to the relation between the holder of a check and the bank on which it is drawn, when at the time of presentment for payment the bank is in funds of the drawer, render the bank liable to an action in favor of the holder.

The reason sometimes urged against liability of the bank to the holder of the check, that an assignment of anything less than the whole amount of a demand is not binding, even in equity, because no debtor is obliged to divide his liability and have more than one creditor, does not apply to the case at bar. The bank, by its contract, when it takes the deposit of its customer, agrees with him that he may assign the debt in as many portions as he pleases, and that it will not only respect and recognize such assignments, but will pay the assignees.

The bank is not thereby made liable to different persons for the same cause of action. If the depositor sues, it is not for the amount of the check, but for the whole amount of his deposit, or for breach of contract and injury of his pecuniary credit. But the drawee sues on the implied promise of the bank, for the amount of the check only.

The universal usage also existing among banks and their customers, by which every person who takes a check does so upon the ground that it will be paid by the bank if it has sufficient funds of the drawer to meet it at the time of its presentment, would be sufficient to establish the obligation of the bank to the holder of the check. Any different rule would be subversive of all the usages which regulate large transactions in commerce.

Whenever this question has been directly raised and passed upon, the liability of the bank to the holder of the check has been established. *Fogarties v. State Bank*, 12 Rich. 518. *Vanbibber v. Bank of Louisiana*, 14 Louisiana Annual, 481, 482. *Munn v. Burch*, 25 Ill. 35. *Chicago Insurance Co. v. Stanford*, 28 Ill. 168. *Harris v. Clark*, 3 Comst. 93, 120. *In re Brown*, 2 Story, 502, 519. *Roberts v. Corbin*, 26 Iowa, 315. *Ancona v. Marks*, 7 H. & N. 686. Byles on Bills (5th Am. ed.) 21, and notes. Morse on Banking, 469-474.

*P. E. Tucker*, for the defendants.

GRAY, J. It is a general rule of law, that upon a promise made by one person to another, for the benefit of a third from whom no consideration moves, the latter cannot sue; and the exception to this rule, which holds a person, in whose hands funds have been placed to pay creditors of the depositor, liable to

actions by them, has not been extended, in this Commonwealth or in England, to a case in which neither such creditors nor the amounts of their debts are named or ascertained at the date of the promise. *Mellen v. Whipple*, 1 Gray, 317. *Dow v. Clark*, 7 Gray, 198. *Frost v. Gage*, 1 Allen, 262. *Fairlie v. Denton*, 8 B. & C. 395; *S. C.* 2 Man. & Ryl. 353. *Gerhard v. Bates*, 2 El. & Bl. 476. And by our law a promise to the drawer by the drawee of a negotiable draft or bill of exchange to accept and pay the same does not make the drawee liable to an action by a holder, unless he has taken the draft on the faith of such promise; but is a mere chose in action, upon which he only to whom it was made can sue. *Exchange Bank v. Rice*, 98 Mass. 288, and *ante*, 37. In the cases, mentioned at the argument, of general letters of credit and public offers of reward, the person who, by making an advance in the one case, or doing the acts specified in the offer in the other, accepts the proposition of the defendant, becomes himself the other party to the contract, and the one from whom the consideration moves.

The plaintiff in the present case does not allege that the defendants made any promise to him, or that he did anything upon the faith of their promise to the drawer, or even knew of that promise when he took the check sued on. The relation between the defendants and the drawer, as disclosed in the declaration, was simply the ordinary one of bankers and customer, which is a relation of debtor and creditor, not of agent and principal, or trustee and *cestui que trust*. The bankers agree with their customer to receive his deposits, to account with him for them, to repay them to him on demand, and to honor his checks to the amount for which they are accountable to him when the checks are presented; and for any breach of that agreement they are liable to an action by him. But the money deposited becomes the absolute property of the bankers, impressed with no trust, and which they may dispose of at their pleasure, subject only to their personal obligation to the depositor to pay an equivalent sum upon his demand or order. The right of the bankers to use the money for their own benefit is the very consideration for their promise to the depositor. They make no agreement with the

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holders of his checks. A check drawn by him in common form, not designating any special fund out of which it is to be paid, nor corresponding to the whole amount due to him from the bankers at the time, is a mere contract between the drawer and the payee, on which, if payable to bearer, and not paid by the drawees, any holder might doubtless sue the drawer, (as suggested in *Ancona v. Marks*, 7 H. & N. 686, 696, cited for the plaintiff,) but which passes no title, legal or equitable, to the payee or holder, in the moneys previously paid to the bankers by the drawer; and the bankers' promise to the drawer to honor his checks does not render them, while still liable to account with him for the amount of any check as part of his general balance, liable to an action of contract by the holder also, unless they have made a direct promise to the latter, by accepting the check when presented, or otherwise. The view, thus briefly stated, is in accordance with the law as established in England, in New York and in Pennsylvania, with the opinions heretofore expressed by this court, and with the recent unanimous decision of the supreme court of the United States. *Foley v. Hill*, 1 Phil. Ch. 399, and 2 H. L. Cas. 28. Parke, B., in *Bellamy v. Marjoribanks*, 7 Exch. 389, 404. Addison on Con. (6th ed.) 810. *Chapman v. White*, 2 Selden, 412, 417. *Loyd v. McCaffrey*, 46 Penn. State, 410, 414. *Bullard v. Randall*, 1 Gray, 605. *Dana v. Third National Bank*, 13 Allen, 445. *Bank of the Republic v. Millard*, 10 Wallace, 152.

*Judgment for the defendants affirmed.*

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RICHARD PRICE vs. CHARLES H. MINOT & others.

A. (who was one of the three directors, and also treasurer, of a trading corporation, and owned 1801 of the 3600 shares of its capital stock) made a contract, in 1865, with B., (who was, and had been for several years, a servant of the corporation charged with important duties in its business, and paid by an annual salary,) of which they signed this memorandum: "Jan. 1, 1864, to Jan. 1, 1871. Earnings from Oct. 1, 1870, to Oct. 1, 1871, and all subsequent years, on 300 shares, to be paid to B., and said 300 shares to belong to B. but not to be transferred so long as A. desires to keep the control of the corporation, said 300 shares standing in his name and thereby giving him a majority of said shares. It is agreed that if between Jan. 1, 1864, and Jan. 1, 1871, B. should die or leave the corporation, *pro rata* shares for the then unexpired term shall be considered as



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earned and due under above agreement, after Jan. 1, 1871. Whenever A. can keep the control or majority of shares and yet part with 300 shares, said 300 shares shall then be transferred to B.' It was the policy of the managers of the corporation to accumulate its earnings without declaring dividends; and to interest its servants in their duties by making them sharers in the profits. B. remained in the service of the corporation until 1869, when he was dismissed from it without his fault, and although he was willing and offered to continue in it. A. took part in the dismissal, and at the same time gave B. notice to consider their contract terminated. *Held*, on a bill in equity thereupon filed by B. for the declaration against A. of a trust in B.'s favor in 300 shares of A.'s stock, (1) that the contract imported that if B. should continue in the service of the corporation until January 1, 1871, rendering services of the same general character as he had previously rendered, he should be considered as having earned the 300 shares; (2) that the contract imported a valid consideration for A.'s promise concerning these shares, in the implied agreement of B. to render future personal services to the corporation; (3) that the contract was not within the Gen. Sts. c. 105, § 6, which avoids agreements to sell or transfer shares in the stock of a corporation, unless the contracting party is at the time owner or assignee of the shares, or a duly authorized agent of the owner or assignee; (4) that the contract was also not avoided by a by-law of the corporation, that no shareholder should convey any shares, unless to his legal heirs, without first offering them to the corporation at par; (5) that the stipulation of the contract for an apportionment of the 300 shares in event of B.'s leaving the corporation was not applicable to a dismissal of B. from the service of the corporation without his fault; and (6) that the participation of A. in B.'s dismissal, and the notice which he gave to B. of a simultaneous termination of the contract, was a breach of the contract, which entitled B. to a decree declaring the trust in his favor, although the bill was filed before the time when his right to earnings on the shares was to accrue. *Held, also*, in reference to a prayer of the bill for a decree to restrain A., as owner of a majority of the shares, from permitting the corporation to carry on business unauthorized by the charter, (1) that the bill was not multifarious in seeking such relief; but (2) that it should not be granted in the absence of the corporation as a party.

**BILL IN EQUITY** filed December 23, 1869, against Charles H. Minot and the Tudor Company.

The bill alleged that the said company were a corporation organized under the Gen. Sts. c. 61, with the name of the Tudor Ice Company, which was afterwards changed to the Tudor Company, and with a capital stock fixed at \$360,000, and divided into 3600 shares of the par value of \$100; that on May 20, 1863, Minot, owning a majority of the shares, promised the plaintiff, in writing, for the purpose of inducing him to remain in the service of the corporation, to pay him a salary in money, and to hold 300 shares in trust for him, and transfer them to him whenever the profits earned thereon, from and after October 1, 1863, should be sufficient to pay for them at the price of \$500 per share; that the plaintiff, for this consideration, remained in the service of the

corporation till September 30, 1869; that, shortly before February 17, 1865, the corporation having made large gains but declared no dividend since May 20, 1863, Minot and the plaintiff agreed further, in writing, that Minot should receive the profits on said 300 shares up to October 1, 1870, in full payment for the shares, and then transfer them to the plaintiff, or the plaintiff might abide by the terms of the previous writing, as within a reasonable time the plaintiff should elect; that, shortly afterwards, Minot requested the plaintiff to hand him said previous writing, and the plaintiff did so; and that, upon receiving it, Minot burned it and said to the plaintiff that he would give him another writing containing the same terms in a different form.

The bill then alleged that on or about February 17, 1865, Minot handed another writing, signed by himself, to the plaintiff, and requested the plaintiff to sign it, and the plaintiff, "being a clerk in the employment of said corporation, controlled by said Minot, and without perceiving or understanding the differences between said writing and the contract between himself and Minot destroyed by Minot as aforesaid, and seeing that by said writing the plaintiff was deemed to have elected Minot to take the profits on said 300 shares up to October 1, 1870, which was the plaintiff's wish, and without any legal or equitable consideration for the alteration of said previous contract," signed the writing; and that thus signed it read as follows:

"Jan. 1, 1864, to Jan. 1, 1871. Earnings from Oct. 1, 1870, to Oct. 1, 1871, and all subsequent years, on 300 shares, to be paid to R. Price—and said 300 shares to belong to R. Price, but not to be transferred so long as C. H. Minot desires to keep the control of Tudor Company, said 300 shares standing in his name and thereby giving him a majority of said shares. It is agreed that if, between Jan. 1, 1864, and Jan. 1, 1871, said R. Price should die or leave Tudor Co.—*pro rata* shares for the then expired term shall be considered as earned and due under above agm't, 'after Jan. 1, 1871.' Whenever C. H. Minot can keep the control or *majority* of shares, and yet part with 300 shares, said 300 shares shall then be transferred to R. Price. During 1864, \$5000 paid Reed and Bartlett Estate; \$10,000 Todd's Wharf,

§ New Tobacco Building ; and any subsequent sums to be covered in some proper manner either by an issue of extra stock prior to Oct. 1, 1870, or in such other way as may be just.

" Boston, February 17, 1865. The foregoing read, approved, and agreed to, by

" C. H. Minot.

" In presence of

" Richard Price.

" Benjamin F. Field."

The bill alleged that this writing, so signed, was not equitably or legally binding on the plaintiff ; but if it was binding, then that Minot, owning and controlling a majority of all the shares, caused the corporation to give the plaintiff written notice, on June 30, 1869, that he would be discharged from their employment on September 30, 1869, with intent to cause the plaintiff, under the terms of the writing, to lose his right to a portion of the 300 shares therein agreed to be transferred to him ; that the plaintiff, on September 29, 1869, gave the corporation and Minot notice of his wish not to be discharged from the employment, and his readiness to continue therein, to which they replied that their notice of discharge was final and conclusive, and Minot stated that the plaintiff must consider his written agreement as terminating on said September 30 ; that, by reason of the premises, and this involuntary discharge of the plaintiff from the service of the corporation, no apportionment of the 300 shares specified in the writing can be justly made, and the plaintiff is entitled to the whole of them ; and that, since the writing was signed, Minot had become owner of such a number of shares that the provision of the writing as to his retaining the 300 shares so due and belonging to the plaintiff was no longer in force, but nevertheless Minot refused to transfer them to the plaintiff.

The bill further alleged that the Tudor Ice Company were organized for the purpose, specified in the certificate of their organization filed with the secretary of the Commonwealth, of cutting, storing and selling ice, but in violation of law had engaged in other and different business, and had been and were now engaged in buying, importing and selling merchandise generally, pledging and employing in said business their funds and credit to amounts always large and sometimes exceeding \$1,500,000 ; that the cor-

poration had bought real estate at Charlestown, and established and run thereon a tobacco factory, a jute mill and a rice mill, at a cost of at least \$150,000, and had also established thereon a linseed-oil mill, at a cost of at least \$250,000, and was preparing to run it; that these doings of the corporation originated with Minot, and were controlled by him by reason of his being owner of a majority of the shares of the capital stock, and had already impaired, and were likely to further impair, the value of the shares, and that for the protection of his 300 shares the plaintiff had notified and requested Minot not to permit the corporation to carry on business outside of the scope of its corporate powers, but Minot had taken no steps to terminate the business nor had notified or required the corporation to abstain therefrom.

The prayer was, for a discovery; for a decree declaring a trust in Minot in the 300 shares for the benefit of the plaintiff according to the terms of the writing burned by Minot, but if said writing should be deemed to have been cancelled, then declaring a trust in Minot in the 300 shares for the benefit of the plaintiff under the writing of February 17, 1865, and commanding their transfer to the plaintiff; for a decree to restrain Minot from permitting the corporation to carry on business not included in its certificate of organization; and for general relief.

Minot appeared and answered. Service was also made on the Tudor Company, but they did not appear.

The answer of Minot first alleged that the bill set forth and relied on distinct subjects matter of suit, which ought not to be joined; and that the proper parties were not before the court.

It admitted, in substance, the allegations of the bill concerning the organization of the Tudor Ice Company, and the number and par of the shares of the capital stock; and it alleged that on or about May 20, 1863, Minot was owner of 1801 shares, subject to the by-laws of the corporation, and continues to own them, and does not, and never has, owned more.

It then alleged that the plaintiff entered into the employment of the corporation on or about March 1, 1862, under an oral contract to serve for five years as a clerk, at an annual salary of \$800 for the first year and increasing thereafter to \$2500 for the fifth

year, and remained in its employment during the five years without any other contract, and at the end thereof continued to be employed by the corporation as a clerk, without any understanding and agreement between him and the corporation as to the period for which he should serve, until October 1, 1869, when his service ended because the corporation had no further occasion for it and had given him notice accordingly three months before.

It denied that Minot ever made any such agreement with the plaintiff as the written agreement alleged in the bill to have been burned ; or that the plaintiff continued in the service of the corporation until September 30, 1869, in consideration or consequence of any promise made to him by Minot ; or that Minot ever gave the plaintiff any election between two agreements, as alleged in the bill ; or that he ever burned any such writing as was alleged ; or that he ever agreed to give the plaintiff another writing in a different form ; or that he holds, or ever has held or agreed to hold, any shares of the stock in trust for the plaintiff.

It admitted that on or about February 17, 1865, Minot and the plaintiff signed the writing of that date, set forth in the bill ; denied that Minot ever at any time made any other agreement, written or oral, with the plaintiff, concerning stock in the corporation ; alleged that the writing was without consideration, and was a mere gratuity of Minot to the plaintiff, as a matter of friendship and a stimulus to the plaintiff in his service of a corporation in which Minot had a large personal interest ; and denied that the 300 shares mentioned in the writing belonged to the plaintiff, or that Minot holds them in trust for the plaintiff, or that the plaintiff is entitled to a transfer of them, or the earnings or profits of them.

It further denied that Minot ever controlled the business of the corporation, and alleged that the business was controlled by a board of three directors of whom he was one ; admitted that he was treasurer, but denied that he was active manager of the corporation ; admitted that the corporation, on June 30, 1869, through the board of directors, gave the plaintiff notice to terminate his employment on September 30, 1869 ; alleged that Minot " did not cause the corporation to give this notice, with the intent

thereby to impair any rights of the plaintiff under the writing" of February 17, 1865; and denied that Minot "gave any notice to the plaintiff as to the nature and character of his supposed rights under that writing."

Finally it denied all the allegations of the bill concerning a violation of law by the corporation in the conduct of its business; and alleged that the plaintiff was a director of the corporation for the four years succeeding the signing of the paper of February 17, 1865, and in that capacity, and as clerk, at all times knew of and participated in the doings of the corporation of which he complained.

The plaintiff filed a general replication; and the case was heard by the chief justice, and reserved for the determination of the full court, upon the pleadings and a commissioner's report of the evidence.

A considerable part of the evidence related to the allegations of the bill and answer concerning agreements between the plaintiff and Minot about an interest for the plaintiff in the stock, before the writing of February 17, 1865; and another portion related to the business alleged to have been done by the corporation *ultra vires*. Both of these are now immaterial for the purposes of this report.

The evidence showed that the Tudor Ice Company was first organized in 1860, and the original holders of the 3600 shares of its stock were, Frederick Tudor, who held 2895 shares, and three other persons, who held respectively 400 shares, 300 shares, and 5 shares, and all of whom had been previously associated with Tudor in the ice business; that Minot first became a stockholder in the year 1861, by the transfer to him of 1801 shares by Tudor, and a written agreement was made between him and Tudor, under date of October 1, 1861, for the payment of the price of the 1801 shares from their future earnings, in which it was set forth that it was "the intention of the parties hereto to secure to the said Minot the uncontrolled majority in voting at all meetings of the Tudor Ice Company;" that the number of stockholders always remained small; that most of them were actively concerned in conducting the business of the corporation; that the policy

pursued in the business from the beginning had been to accumulate earnings without declaring dividends ; and that the following was one of the by-laws of the corporation : " No proprietor shall devise, sell, assign or convey any shares to any person, except his legal heirs, without first offering them to the corporation at their par value, and the directors are hereby empowered to purchase all shares at said price, which may be offered to them, for account of the corporation, when they shall deem it expedient so to do."

The evidence also showed that at the time when Minot first became interested as a shareholder in the corporation he was a member of a mercantile firm in Boston, which the plaintiff was serving as a clerk at an annual salary of \$1500 ; that the plaintiff entered the service of the corporation soon afterwards ; that the work which the plaintiff did in the employment of the corporation was not mere clerical work, but involved the exercise of a high degree of discretion, and the charge of large pecuniary interests ; and that the corporation, through its officers, and particularly through Minot, repeatedly expressed to him satisfaction with the manner in which he did it ; that the plaintiff's salary was paid in gold or its equivalent, and after the first five years of his service he was paid an annual salary exceeding \$2500 ; that on the plaintiff's complaining to Minot, at some time early in the year 1866, of the insufficiency of his salary in view of the cost of living, reference was made by Minot, in writing, to the ultimate interest of the plaintiff in the stock, as an element for him to consider in computing what his compensation really was , and that, under date of May 15, 1868, the following writing, supplemental to the writing of February 17, 1865, was signed by him and Minot : " It is agreed between the undersigned, that, in the event of the passage of any act of the legislature, incorporating a company to whom the property of the Tudor Company, now in existence, shall be transferred, or any part thereof, the rights and interests of the undersigned Richard Price, by virtue of the agreement between us of February 17, 1865, shall be protected in such manner that he shall derive all the benefits and advantages that shall accrue to Mr. Minot, or any other of the shareholders, directly or indirectly, in proportion to his interests,

without prejudice to the rights of C. H. Minot to cover certain expenditures by the issue of extra stock, in the manner and to the extent provided in the above named instrument, dated February 17, 1865."

The evidence further showed that the plaintiff was notified to quit the service of the corporation, by a letter addressed to him under date of June 30, 1869, signed "Tudor Co. by C. H. Minot, Treasurer," in these terms: "Please to take notice that your services in our employ, and salary, will cease September 30, 1869;" that on September 29, 1869, he addressed to the corporation a written communication in these terms: "On the 30th of June last, I received a notification of that date, signed by Charles H. Minot, your treasurer, that my services in your employment, and my salary, would cease to-morrow. I desire to state that it is my wish to continue in your employment, and that you will consider this an offer on my part to do so. Will you state to me if the notice is to be considered by me final and conclusive?" and to this he received under the same date the following reply, signed like the letter of June 30, and also countersigned by Minot and the other directors, as directors: "In reply to your note of this date, you will please consider our letter of June 30 to you as final and conclusive, and that your services in our employ will terminate September 30, 1869;" that on September 29, 1869, he also addressed the following letter to Minot: "I received, on the 30th of June last, a notice from you, as treasurer of the Tudor Company, that my services in the employment of that company, and my salary, would cease on the 30th of this month. I have notified the company of my desire to continue in their employment;" and that under the same date Minot wrote to him as follows: "My written agreement with you you will please consider as terminating September 30, 1869, at the date your services end with the Tudor Company."

The evidence failed to sustain the allegations of the bill that Minot had become owner of a number of shares exceeding by more than 300 a majority of all the shares.

All other conclusions of fact, that are material, are stated in the opinion



*S. Bartlett & D. Thaxter*, for the plaintiff.

*C. B. Goodrich & H. W. Paine*, for Minot.

AMES, J. It is admitted that the plaintiff's right to maintain his bill must depend upon the contract of February 17, 1865. This contract has been so often recognized and acknowledged by both parties, that it must be considered as taking the place of all previous incomplete arrangements in relation to the same subject matter, if any such there were.

This agreement, although not expressed with entire technical precision, is far from being unintelligible. It imports that the plaintiff was at that time in the service of the Tudor Company and that he had been so employed since January 1, 1864. The evidence, indeed, shows that he entered their service at a still earlier date. The contract provides that he might continue in their employ until January 1, 1871. It does not undertake to define the nature of the service which he had rendered, or was to render; and we must therefore infer that the parties fully understood each other upon that point, and that the plaintiff was to continue to be employed in substantially the same manner as he had been before. The report shows that the plaintiff held an important and confidential position in relation to the business of the company, and that his services were fully appreciated by and were satisfactory to the defendant.

The agreement provides that, at some future time, he was to become entitled to three hundred shares, without saying at what valuation or nominal price, and without even directly saying in what corporation, although it is sufficiently manifest, from other parts of the paper, that the Tudor Company was the one intended. We must conclude, upon the evidence, that the course of business in that company, in which the stockholders were few in number, and were all active participators in its management, was to increase the corporate fund by reserving and accumulating the earnings, instead of distributing them in the form of dividends. The earnings upon the three hundred shares, that should accrue after October 1, 1870, were to belong to the plaintiff, but the shares themselves were not to be transferred to him until a later period. The interpretation of the contract seems to be, that, if the plain-

tiff should continue in the employment of the company until January 1, 1871, rendering services of the same general character as he had previously rendered, he should be considered as having earned three hundred shares in the stock then standing in the name of the defendant. The services were to pay for the shares, and were agreed to be their equivalent. There was, therefore, no occasion to name any other salary or price for the services, or to affix any definite valuation to the shares. In case of the death of the plaintiff, or if he should leave the employment of the company, before the expiration of the time limited by the contract, the number of shares to which he or his personal representative would be entitled was to be reduced in an equitable proportion. The transfer was to be delayed for the convenience of the defendant, who was to retain the nominal and legal title in his own hands until such time as he could part with them and yet retain the control of a majority of all the shares of the capital stock. The contract implies that there was to be an annual making up of the corporate accounts on the first day of October, for the purpose of ascertaining the earnings of the previous year; and it indicates also (what the evidence shows was the usual policy of the company) a purpose on the part of its managers to have its servants and agents interested in its fortunes, and solicitous for its prosperity, by becoming participators in its profits.

Upon this view of the contract, (the correctness of which we cannot doubt,) it imports in its terms a valid and sufficient consideration. It is a promise by the defendant to pay in a specific mode for services to be rendered to a corporation in which he had a very large interest, and in which he had, and was desirous to keep, a controlling influence. The objection on the ground that the contract was without consideration cannot be sustained, without doing violence to the most familiar and well settled definitions of that word.

The objection that the contract is illegal under Gen. Sts. c. 105, § 6, appears to us to be equally untenable. According to that statute, every contract for the sale or transfer of any share in the stock of any corporation is void "unless the party contracting to sell or transfer the same is, at the time of making the contract,

the owner or assignee thereof," or authorized by such owner, &c., to sell and transfer. But the defendant, when he made this contract, owned a much larger number of shares than he promised to transfer. His undertaking was in relation to three hundred shares which he then held, and which he promised to hold until the happening of a future and expected event, and then to transfer. It will not bear the interpretation that he was first to buy three hundred additional shares, and to transfer those specifically, rather than any other three hundred that stood in his name.

The by-law of the corporation, which provides that no stock shall be transferred by any shareholder without having been first offered to the corporation itself at par, furnishes no legal objection to the defendant's contract. It might be an embarrassment in the way of its fulfilment, but cannot affect its interpretation. It may be, in view of his position and influence in the company, and his ability to outvote all the other stockholders, that this part of his contract presents no difficulty which he did not feel able to overcome. It is clearly no obstacle in the way of his holding the nominal and legal ownership, while at the same time the income, profits or benefits should belong wholly to the plaintiff.

We see no ground, therefore, on which it can be said that the contract was not legally and equitably binding upon the defendant.

It gave to the plaintiff the right to remain, at his option, in the service of the company for the whole of the stipulated period. It makes no reservation of any right on the part of the company to dismiss him from their service, or of any right on the part of the defendant to concur in such a dismissal. So far as the defendant is concerned, he has given to the plaintiff an absolute right to an opportunity to earn the three hundred shares by rendering the services which were the subject matter of the contract. This right can only be defeated by his death, or his voluntary withdrawal from the company's employment before the expiration of the term.

The expression, "if he should leave the Tudor Company" before January 1871, can only mean, if he should resign, or voluntarily quit or give up his employment. It is not the proper form

of expression for the case of his expulsion or dismissal by the act of the company, without his consent, and against his remonstrance. As the plaintiff has made a formal tender of his services, and has refused to resign his position, there has been no such termination of his engagement with the company as to render the defendant responsible, under the contract, for less than the whole number of shares originally agreed upon. He cannot claim an apportionment on the ground that the contract was only partially fulfilled.

It is insisted that the removal of the plaintiff from his position was not the defendant's own act. It was, at least, an act in which he participated. He not only concurred in it officially and personally, but he made it the occasion for renouncing his own personal contract, and gave notice that his written agreement with the plaintiff would terminate at the same time. In so doing, he violated his contract. The plaintiff is in a position to say that he has wrongfully been prevented from finishing the proposed service, and that his rights are substantially the same as if he had served for the whole term.

The effect of the contract was to create a trust for the benefit of the plaintiff. It provided that he was to have an equitable right, title and interest in the shares, distinct from the mere legal ownership. After a certain date, all the earnings on these shares were to belong to him, and to be accounted for by the defendant to him. On the happening of a certain event, he was to be entitled to the legal ownership also. The defendant's promise is, that whenever (that is to say, as soon as) he can part with these shares and yet keep a majority of the stock, he will make a transfer accordingly. His holding of them in his own name in the mean time is provisional and temporary. The written contract is express, that this temporary holding is in trust for the plaintiff; and it will bear no other interpretation. There is nothing in the answer to show that the defendant has not been able to procure other shares, or that he has made any effort to do so.

It is true that the plaintiff's bill was filed before the time had arrived at which his right to the earnings upon the shares had accrued. But no such ground of defence is suggested in the de-

fendant's answer. According to the pleadings, he denies that he ever made the contract; he denies that the document of February 17, 1865, was of any validity, or amounted in law to a contract; he insists that it only provided for a gratuity, or mere act of friendship, and was without any legal or equitable consideration; and he denies that it created any trust, or gave the plaintiff any interest or right in the shares whatever. As we find, however, that none of these defences can be sustained, we find ourselves dealing with a case of the unwarrantable and wilful repudiation of a fully established trust, and a direct endeavor to deprive the party in whose favor it was created of all its benefits. Under these circumstances, we think that the plaintiff is entitled to have the trust declared, and that the objection that the suit is prematurely brought, even if it were open to the defendant upon the pleadings, cannot be maintained.

If the defendant had merely remained passive, the case in this respect might have stood differently. But, in fact, he has formally and in writing repudiated the contract; he has joined in removing the other party from his position; he has denied the plaintiff's right, and has taken active measures to defeat the trust. The plaintiff's right, although its practical enjoyment was deferred, was vested, and not merely contingent. It was not a mere probability of title, depending upon an event which might or might not happen, but it comes within what Lord Westbury describes as an existing right, which, whether vested or contingent, and however future or remote, may form the foundation of a right to come here to have it secured. *Davis v. Angel*, 10 Weekly Rep. 723.

A mere denial of the plaintiff's right might not, of itself, furnish a sufficient ground for a decree declaring the existence of the trust; but a denial of the right, coupled with an attempt to defeat it by taking part in the removal of the plaintiff from his position, and thereby to deprive him, in part at least, of the benefit of the trust, stands upon different ground. In *Baylies v. Payson*, 5 Allen, 473, such a denial, accompanied with proof that the trustee was about to go to a foreign country, was held sufficient ground for a like decree.

Our judgment therefore is, that the plaintiff is entitled to a decree declaring the existence of the trust, and ordering that the defendant hold the three hundred shares only upon the trust that all the earnings and profits accruing thereupon after October 1, 1870, are to belong to the plaintiff, and are to be accounted for to him; and that the shares themselves are to be transferred to him as soon as, by purchase or otherwise, the defendant shall have become the owner of not less than two thousand one hundred and one of the shares into which the capital of the company is now divided.

The objection that the bill is multifarious cannot be sustained. If the plaintiff is right in charging the existence and violation of a trust, he may properly ask the aid of the court, if the proper parties are before it, to prevent the trust fund from being squandered, or exposed to improper or unreasonable risks. We cannot see that, in so doing, there would be any confusion of distinct grounds of suit in one bill of complaint. *Robinson v. Guild*, 12 Met. 323.

But as to so much of the bill as charges that the Tudor Company, in its mode of doing business, has exceeded its corporate powers, and acted in violation of law, it is to be remembered that that corporation is not now a party to the suit. It is true that the bill alleges that this violation of law originated with, and was controlled, and carried into effect, by the defendant Minot, by reason of his being the owner of a majority of the stock; and that its effect has been, and must continue to be, to impair the value of the property; and the relief prayed for is, that he be enjoined and restrained, as to all future operations of the company, from allowing such illegal proceedings. But it is manifest that we cannot grant relief in that form without affecting the interests of the corporation, and possibly to a very great extent. Upon this question of *ultra vires*, the corporation is an indispensable party, having so great and important an interest in the controversy that no final decree upon the subject could be made without affecting that interest. We must decline, therefore, to make any such decree in its absence. *Palmer v. Stevens*, 100 Mass. 461. Story Eq. Pl. § 72.

*Trust declared.*

ELLJAH C. DREW *vs.* WILLIAM A. BEARD.

The fact that a man is a partner under articles which define the nature of the business of the firm, provide that it shall be done in a certain place in his name, and do not prohibit him from dealings on his own account, raises no presumption that business of a different nature, done by him elsewhere in his name, is on the joint account.

Written articles of partnership "for the purpose of trade, especially for the sale of goods and merchandise" from certain northern seaports, where they are to be bought by one partner, at certain southern seaports, where they are to be sold by the other partner, which do not limit the time of either partner exclusively to the business of the firm, or prohibit either from business on his own account, do not include within their scope a purchase of metals by one of the partners at an auction in a town several hundred miles inland from the southern seaports, their transportation to the coast, shipment north, and sale in a northern port by a factor; or a transaction in relation to cotton, which consists of his making and performing a contract with the government, to collect and re-sale a large quantity of cotton in an inland district, and transport it to the coast, receiving part of it for his compensation, and of his shipment of his part to the north and sale of it there by the factor, in like manner with the metals.

A bill in equity, to wind up a partnership of the parties under written articles, was referred to a master to state an account. His report, by including certain transactions, showed a balance due to the plaintiff; and also showed that, if they were erroneously included, a balance was due to the defendant. The defendant alleged exceptions, on the ground that the transactions were not within the scope of the written articles of partnership. At the close of the argument of the exceptions before the full court, between three and four years after the commencement of the suit, the plaintiff gave notice that he should move to amend his bill by adding allegations which would apply to the transactions, if the exceptions were sustained. The decision sustained the exceptions; and the plaintiff filed the motion. *Held*, that as, upon the facts, it was unreasonable to doubt that the plaintiff, when he filed the bill, intended that it should apply to the transactions in dispute, and the question whether it did so was one upon which counsel might honestly differ, the amendment should be allowed, although its effect was to introduce a substantially new cause of action; but upon terms that he should pay the defendant's costs to the time of the amendment, and take no costs himself to that time if he should finally prevail; and that, as the defendant alleged that he was taken by surprise, and compelled to meet the issue of those transactions without due preparation, at the hearing before the master, the case should be reopened for a new hearing thereon, at the defendant's election.

The report of a master in chancery on questions of fact referred to him, depending upon conflicting evidence, is not conclusive, although every reasonable presumption is to be made in its favor; and if the evidence clearly shows that he is mistaken in his conclusions, the court will set them aside upon exceptions.

BILL IN EQUITY filed November 5, 1866, for a settlement of business transacted under written articles of partnership dated and entered into by the plaintiff and the defendant at Port Royal in South Carolina on January 6, 1865, which provided that, "for the purpose of trade, especially for the sale of goods and mer-

chandise from Boston and New York at Port Royal, S. C., Savannah, Ga., and Charleston, S. C.," it was mutually understood and agreed as follows :

" 1. The business to be done on joint account, for the mutual and equal benefit of the parties ; all profits or losses to be equally divided.

" 2. The capital to be furnished in equal amounts, and not to exceed \$60,000 without further agreement by the parties.

" 3. The goods and merchandise to be bought and shipped from Boston and New York by the said Drew, and the business at that end to be managed mainly by him.

" 4. The sale of the goods, and the general management of the business at Port Royal, Savannah and Charleston, to be assumed by the said Beard.

" 5. No charge or commission is to be made by either party for personal services ; all help necessary to conduct the business, and all expenses required to carry on the business successfully, first to be paid from the profits, or divided as a loss.

" 6. It is now proposed by the parties to open a jobbing store at Port Royal to sell only by the package ; also to open a retail and jobbing store at Savannah.

" 7. Each party holds himself responsible to the other for the faithful performance of all business and all joint account moneys, goods and merchandise intrusted to or done by him.

" 8. This arrangement for a joint account business, to be done in the name of W. A. Beard at Port Royal, Savannah and Charleston, and of E. C. Drew at Boston, and is to continue only so long as is mutually agreeable, and may be terminated by either party by an offer to buy or sell out to the other party."

The bill alleged that " under and by virtue of these articles of copartnership the said business was commenced and carried on by the said parties, and the defendant had and exercised the chief management and control of the said business at Port Royal, Savannah and Charleston ;" that the plaintiff put a large amount of capital, to wit, \$30,000, into the said business, and applied his best skill and judgment to it, that a large amount of profits, to wit, \$60,000, were realized by the defendant in said business and



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retained by him ; that " the said copartnership has terminated and been dissolved ; " and that the plaintiff requested the defendant to come to a settlement " touching the said business and dealings, and the sums received by the defendant," and the defendant neglected and refused to do so. The prayer was for an answer, and for " such further and other relief in the premises as the nature and circumstances of this case may require."

The defendant, in his answer, admitted the execution of the written articles of partnership, and that he had and exercised the chief management and control of whatever business was carried on under them at Port Royal, Savannah and Charleston ; alleged that he faithfully executed his duties under them ; denied that the plaintiff put \$30,000 into the business, but alleged that the plaintiff bought invoices of goods and shipped them to the defendant and paid for them with the proceeds of remittances made to him by the defendant ; denied that the said business resulted in profit, and alleged that it resulted in a great loss, of many thousands of dollars, the precise amount of which he could not state until the plaintiff should account to him for goods which remained in the plaintiff's hands to be disposed of in settlement thereof, and for which the plaintiff neglected and refused to account ; denied that he ever refused or avoided coming to a just and full settlement with the plaintiff touching said business, and alleged that on the contrary he had always desired and been ready to come to such a settlement, but was prevented from doing so by the plaintiff's neglect and refusal to account as aforesaid ; denied that any amount was due from him to the plaintiff, and alleged that a large sum was due from the plaintiff to him ; and annexed an account alleged to be " an account of all his business and dealings with the plaintiff under the said articles of agreement, so far as it is possible for the same to be made by him while the plaintiff neglects and refuses to render to him an account as aforesaid."

The plaintiff filed a general replication ; and in December 1867 the case was referred to Charles C. Nutter, Esq., one of the masters in chancery for this county, " to state an account," who filed his report in October 1869, together with exceptions alleged

thereto by the defendant. By the report, and a statement of all the evidence, which was annexed to it, these facts appeared :

“ The parties executed the written agreement alleged in the bill, and thereupon proceeded to carry on business according to the terms of said agreement, and opened two stores in Savannah about February 1, 1865, for the sale of goods and merchandise. Salesmen were employed, and the business was transacted by selling the merchandise which had arrived and was arriving from time to time, the plaintiff purchasing principally the goods at the North and shipping them to Savannah, where most of the sales were made, principally under the management and direction of the defendant, and where the business was conducted in his name, as provided by said articles of partnership ; and the said business continued until the last of November or first of December 1865, when the stores were closed.” The evidence showed that the partnership was terminated by an offer made by the plaintiff to the defendant, pursuant to the eighth article of their agreement, at some time between the 10th and 19th of November ; and that the keys of the stores were surrendered to the landlord on November 30.

During several months of this period the plaintiff was personally at Savannah. The rest of the time he was in the North, chiefly at Boston, where he carried on business individually, or in Florida, where also he had individual business. The defendant was at Savannah during the whole period, with the exception of time consumed in three journeys to and from the North, and of portions of August and the three ensuing months, in which (as also in December, after the stores of the firm were closed) he was engaged in transactions at and near Thomasville in the southwestern part of Georgia, several hundred miles distant from Savannah by the route of communication then existing. The nature of these transactions was briefly as follows :

At a sale by auction, in Thomasville, by a United States treasury agent, of captured and abandoned property, under the treasury regulations relating to such property in the civil war, the defendant in August bought a quantity of old lead and iron and forwarded it thence to New York, consigned to the firm of

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S. W. Lewis & Company, commission merchants, who sold it and accounted to the defendant for the proceeds.

The defendant also, on August 16, at Thomasville, entered into a contract with the treasury agent to collect, rebale and transport certain captured and abandoned cotton, of which on that day the treasury agent wrote, and they signed and sealed the following memorandum :

“ This certifies that I have entered into an agreement with William A. Beard, of New Bedford, now doing business at Savannah, to collect, rebale when necessary, transport and deliver at Jacksonville, Florida, or at some eligible shipping port in Georgia, all cotton which has been turned over to me by the military commander, Colonel Kimball, or to which the United States government have claims, within the military district of Altamaha, said Beard agreeing to place said cotton at said shipping port or ports at the earliest practicable period, and for which he is to receive, in lieu of all expenses incurred, one quarter part of the bales of cotton collected, rebaled and transported. This to be in full of all demands. This division to be made at Thomasville, and under the direction of the supervising special agent, and, in his absence, of the military commandant or his deputy. And the said Beard further agrees to indemnify the United States government for all claims and damages which may accrue from any neglect on his part, or from any expense incurred in collecting, preparing and transporting said cotton.”

Immediately after signing this memorandum the defendant began to collect the cotton, but was interrupted by a legal process sued out from the civil courts of Georgia by persons who made claim to a portion of the cotton, and he desisted, returned to Savannah, and gave the treasury agent notice that he would proceed no further in execution of the contract without the express approval of the secretary of the treasury, to whom the memorandum of it had meanwhile been forwarded for revision. On October 10 he received notice that the contract was approved by the secretary of the treasury, and was directed to carry it into immediate execution, and Savannah was designated as the shipping port at which he should deliver the cotton. He accordingly

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went again to Thomasville on October 24, and during the months of November and December 1865 and the early part of January 1866 collected about 2000 bales of cotton in southwestern Georgia, pressed and rebaled it, transported it from Thomasville to the Altamaha River, down the river to the sea, and thence up the coast to Savannah, where he repaired the damages it had suffered in transportation, and put it into shipping order. Upon its acceptance in such order at Savannah by the treasury agent, who until then maintained control of the whole of it as security for faithful performance of the contract, the defendant's quarter of the cotton, which had been apportioned under supervision of the United States military authorities at Thomasville, was surrendered to him, less whatever number of bales out of the whole lot of cotton had been lost on the route. The cotton thus received by the defendant he consigned to S. W. Lewis & Company for sale, as he did the lead and iron, and they accounted to him in like manner for the proceeds. S. W. Lewis & Company had for many years before the defendant's partnership with the plaintiff been the defendant's agents in New York, and continued to be so during the partnership and after its dissolution; and they included their business done for the defendant individually, and that done for the partnership, in one and the same account in his name.

The defendant's pecuniary outlay and risk in this transaction were very great; an attempt was again made to arrest him on process of a Georgia court; and he was exposed to danger of life and limb, by acts of violence threatened or done by persons interested to prevent the collection and removal of the cotton, which led to arrests by the United States military authorities and the proclamation of martial law at Thomasville.

The defendant objected to the introduction of evidence by the plaintiff, before the master, of these transactions in lead and iron and cotton, as not warranted, under the order of reference to the master, by the plaintiff's bill and the written articles of partnership. But the master ruled that the transactions were "*prima facie* partnership transactions and to be accounted for as such;" admitted the evidence; and required the defendant, on the plaintiff's motion, to produce forthwith his accounts thereof, and also

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all his letters and papers "pertaining to the business," under penalty of not being afterwards permitted to introduce them, if he should refuse their production at that time and the plaintiff should proceed to prove them by other evidence.

The plaintiff accordingly produced his said accounts and letters and papers, showing a net profit in the iron and lead transaction of about \$1500; and in the cotton transaction an expenditure of about \$62,000 in collecting, rebaling and transporting the cotton, a loss on the route of transportation and consequent deduction from his share of cotton of only 12 out of the 2000 bales, and a profit of about \$50,800. Various items of the expenditure, amounting to nearly \$10,000 and consisting of the expenses of teaming, handling and rebaling cotton at Thomasville, and pay of the defendant's employees there, were disallowed by the master.

Excluding these transactions, the master found that the business of the partnership resulted in a loss of \$33,990.27, of which the firm owed the plaintiff \$8,068.44 and the defendant \$25,921.83; and he reported as follows:

"Books were kept at the Savannah stores, of the business transacted there, which were produced before me at the hearing. They were kept, for the most part, by persons unacquainted with book-keeping, and in a very unskilful manner. They purport to contain only the business transactions at said stores, without any entries, as upon joint account, of the said transactions in iron, lead and cotton. Said books purport to contain the account of each partner with the firm.

"The business of buying and selling merchandise, as conducted and carried on in said stores at Savannah, resulted finally in a large loss. The said business of buying, shipping and selling said iron, lead and cotton, as so conducted and done by the defendant, resulted in a large profit. The plaintiff contends that the latter should be accounted for by the defendant, as part and parcel of the business of the copartnership, and that he is entitled to one half of the profits thereof, in general account; while the defendant claims that this was his own private, individual business transaction, in no way connected with the partnership business

and for which he is not liable to account. And this constitutes the main and principal matter in controversy in this suit."

"The plaintiff claims, as hereinbefore stated, that the said operations in lead, iron and cotton should be accounted for by the defendant as belonging to the partnership business. And I find upon the evidence that they should be so accounted for."

"And I accordingly find and report that the defendant was indebted to the plaintiff on March 1, 1869, the date of this report, in the sum of \$24,297.26, as by an account stated in accordance with the foregoing findings and results, which is hereto annexed."

The defendant alleged three exceptions to the report; the first, in that "the master required the defendant to account for the profits made by him on his purchase of lead and iron of the government of the United States, as a part of the business of the partnership between the plaintiff and defendant, the defendant alleging that, upon the plaintiff's bill and the partnership agreement between the plaintiff and himself, said purchase ought not to have been held to be partnership business, and that the master erred in compelling him to account for the profits of said purchase, and in receiving evidence thereof;" the second, in like terms as to the master's rulings in respect to the cotton transaction; and the third, in that, "upon the evidence and facts before the master, he should have found, adjudged and reported that the profits of the purchase of lead and iron, and of the contract with the treasury agent, were not profits of the business of said partnership."

The case was reserved upon the pleadings, master's report, and exceptions, for the determination of the full court, and was argued in March 1870. At the close of the argument, the plaintiff's counsel gave notice that in event of a decision adverse to him upon the first and second exceptions, they should move for leave to amend the bill.

*J. G. Abbott & A. G. Browne, Jr., (W. E. Parmenter with hem,)* for the defendant.

*A. A. Ranney & J. P. Converse,* for the plaintiff.

MORTON, J. The bill in this case alleges, that the parties entered into copartnership by written articles of agreement; that

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under and by virtue of said articles business was commenced and carried on by the parties; that a large amount of profits was made and realized in said business, which was received and retained by the defendant; that the copartnership has been dissolved; and that the defendant refuses to account with the plaintiff and to pay him the amount justly due and belonging to him.

Referring to the articles of agreement, we find that the partnership was established "for the purpose of trade, especially for the sale of goods and merchandise from Boston and New York at Port Royal, S. C., Savannah, Ga., and Charleston, S. C." They provide that goods and merchandise are to be bought and shipped from Boston and New York by the said Drew, and the business at that end to be managed mainly by him, and that the sale of the goods and the general management of the business at Port Royal, Savannah and Charleston is to be assumed by the said Beard. They contain no stipulation that each partner is to devote his whole time to the business of the firm, and no provision prohibiting either partner from entering into dealings or adventures on his own account.

It appeared, at the hearing before the master, that the parties, under their agreement, opened two stores in Savannah for the sale of goods and merchandise, and carried on business there for about ten months, when the stores were closed, and that the said business resulted in a loss. It also appeared that, during that period, the defendant entered into certain speculations or adventures in cotton, lead and iron, the details of which are set out in the master's report, from which he realized a large profit. The plaintiff claimed that the defendant should account to him for one half of the profits thus realized, and offered evidence in regard to said transactions in cotton, lead and iron, which the master, against the defendant's objection, admitted. The question now presented to us is, whether, upon his bill, as it is framed, the plaintiff can maintain this claim; and we are of opinion that he cannot.

The contract between the defendant and the United States treasury agent was clearly not within the scope of the partnership business. It was not a purchase of cotton, but a personal

contract to collect, rebale and forward to a shipping port, cotton in the interior of the state of Georgia, owned or claimed by the United States government, for doing which the defendant was to receive, as compensation, one quarter part of the cotton thus forwarded. The undertaking involved great personal and pecuniary risk. It is obvious that, if this adventure had resulted in a loss, the plaintiff would not have been liable to the United States government. Nor could the defendant charge him with one half of the loss, under and by virtue of the partnership articles. It was a separate and independent transaction, not within the scope of the business of the firm, and therefore one in which the plaintiff had no interest by virtue of the partnership articles. The same is true of the dealings of the defendant in lead and iron. They were not such dealings as he was authorized to engage in by the partnership articles, and were not within the scope of the business of the firm. Story on Part. § 193. *Wheeler v. Sage*, 1 Wallace, 518.

It follows, that, if the plaintiff is entitled to a share of the profits upon these transactions, it must be either upon the ground that they were undertaken by the defendant in fraud of the firm, or upon the ground that the parties made an agreement independent of the partnership articles, that they should be entered into and prosecuted upon joint account. And to entitle him to a decree upon either of these grounds it is necessary that the plaintiff should allege it in his bill. It is an elementary rule of equity pleading, that the bill must contain a clear and exact statement of all the material facts upon which the plaintiff's right to the relief sought depends, and that he can only introduce evidence of such facts as are thus stated. Story Eq. Pl. §§ 23, 251, 251 a. 1 Dan. Ch. Pract. (3d Am. ed.) 334, 364 and note. *Wright v. Dame*, 22 Pick. 55. The bill in this case only alleges that the partnership articles were executed, that business was conducted under and by virtue of them, and that a profit was realized from said business. It does not allege that there was an agreement that the cotton, lead and iron transactions were to be on joint account; nor that the defendant practised any fraud or misconduct which would make him liable to account for the profits of



these transactions. Upon the bill as it stands, the defendant cannot be held liable upon transactions not within the scope of the business of the firm, or the contemplation of the articles of copartnership. To do so would be to permit the plaintiff to recover upon a case not stated in his bill, and of which the defendant was not informed by the pleadings so as to be prepared to meet it.

For these reasons, we are of opinion that the master erred in requiring the defendant to go into a hearing in regard to the cotton, lead and iron transactions, and that the defendant's exceptions to his report must be sustained. *Exceptions sustained.*

On May 21, 1870, after this decision, the plaintiff moved to amend his bill by adding allegations substantially as follows:

1. That, after the parties signed their written articles of partnership, they agreed to engage in procuring lead, iron, cotton and other products and articles, on joint account, by purchase or exchange of commodities, in the southern portion of the United States; that they procured such articles and products by use of their money, goods and credit, and of the time and services of the defendant and a large number of persons paid by him and the plaintiff jointly, and realized therefrom large profits; and that now the defendant falsely pretended that these transactions were his individual transactions, and that the plaintiff was not entitled to an account of or share in them, whereas the plaintiff was entitled to such an account and to an equal share with the defendant.

2. That, during the existence of their partnership under the written articles, the defendant, by representing to the plaintiff that iron, lead and cotton could be advantageously procured by using the money, goods and credit of the firm, and the time and labor of the defendant himself and of persons employed and paid by the firm, induced the plaintiff to tacitly consent to such a use of them, and the use was made, and large profits were thereby realized in the enterprises and ventures; but that, after the dissolution of the firm, and after these enterprises and ventures had resulted in profit, the defendant falsely pretended that he never understood or agreed that the plaintiff was to share therein; and in fact the defendant never did so understand or agree, and was

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not liable to account to and share with the plaintiff on that ground, then that the conduct of the defendant was intentionally fraudulent, in inducing the plaintiff to consent to such a use of money, goods and credit of the firm, and time and labor of the defendant and employees of the firm, and injured the business of the firm, and so the defendant was bound to account to and share with the plaintiff.

The question "whether this amendment can and ought to be allowed at this stage of the proceedings in the case, and upon what terms," was reserved by *Wells, J.*, for the determination of the full court, and argued in November 1870.

*Ranney & Converse*, for the plaintiff.

*Abbott & Browne*, for the defendant. 1. To grant the plaintiff's motion will violate the reasonable rule not to allow an amendment the effect of which is "to abandon the case originally made, and to make a new and distinct one." *Pratt v. Bacon*, 10 Pick. 123, 128. See also *Platt v. Squire*, 5 Cush. 557; *Sanborn v. Sanborn*, 7 Gray, 142; *Merchants' Bank v. Stevenson*, 7 Allen, 489; 1 Dan. Ch. Pract. (8d Am. ed.) 410, note 1, and cases there cited. All the elements needful to a settlement of the suit on its present basis exist in that portion of the master's report to which no exceptions were taken. The determination therefrom of the balances due to the parties respectively from the business done under the articles of partnership is mere matter of arithmetical computation.

2. The plaintiff's laches requires a denial of his motion; especially as to that portion of the amendment which alleges fraud. See *Evans v. Bacon*, 99 Mass. 213; and cases cited in 1 Dan. Ch. Pract. 402, note 1; 406, note 3. His omission to introduce his new allegations by a supplemental bill is conclusive that he seeks to allege nothing which arose after he began this suit on November 5, 1866. See 1 Dan. Ch. Pract. 407, note 3.

3. To grant the plaintiff's motion will be inequitable, in enabling him to reap unjust advantages from a deliberately planned surprise, by which the defendant was forced to a sudden hearing on issues which he had no opportunity to join in framing by the pleadings, and for the trial of which at that time he was unpre-

pared even with the vouchers of large expenses which the nature of his contract concerning the cotton is conclusive that he must have incurred at Thomasville, but which, in the absence of such vouchers, were necessarily disallowed. The court has decided that to permit the plaintiff to recover upon the case as it stands "would be to permit him to recover upon a case not stated in his bill, and of which the defendant was not informed by the pleadings so as to be prepared to meet it."

4. There are no terms, upon which this amendment can be allowed, which will be an equivalent to the defendant for its allowance; that is to say, which will put the parties into substantially the same relative position as if no error had occurred.

MORTON, J. The court has power to allow amendments, in any matter of form or substance, which may enable the plaintiff to sustain the action for the cause for which it was intended to be brought. Gen. Sts. c. 129, § 41. *Merchants' Bank v. Stevenson*, 7 Allen, 489. The granting or refusal of amendments is, however, within the discretion of the court. *Payson v. Macomber*, 3 Allen, 69. In the case at bar, it is unreasonable to doubt that the plaintiff, when he brought his action, intended to include in it the cause of action set forth in the proposed amendment. It is a question therefore of discretion, whether, under the circumstances of this case, the amendment shall be allowed.

We think that the laches of the plaintiff in not properly framing his bill, or in not moving for an amendment at an earlier stage of the case, is not so great that it ought to deprive him of the privilege of amending, upon such terms as shall protect the defendant from injury. The question, whether the transactions of the defendant in cotton, iron and lead were within the scope of the partnership articles, and whether the plaintiff's claim to a share of the profits realized therefrom could be tried under the allegations of the original bill, was one upon which counsel might honestly differ. The plaintiff's counsel might have doubted, until the decision of the court, whether an amendment was necessary.

But the defendant ought not to be prejudiced by the error of the plaintiff. As he alleges that he was taken by surprise at the hearing before the master, and compelled, without due prepara-

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tion, to meet this question of his transactions in cotton, iron and lead, of which he was not notified by the pleadings, it is clear that he ought not to be bound by the findings of the master upon this issue. The case therefore must be reopened, if the defendant so elects, for a new hearing so far as this issue is concerned.

We think also, that, as upon the bill as originally framed the defendant has prevailed, and the amendment introduces a substantially new cause of action, the plaintiff should pay the defendant's costs, and take no costs, if he prevails, up to this time. Upon these terms, the amendment may be allowed. The case is to stand for hearing before a single justice, who, upon proper application, after the answer to the amended bill is filed, will make the necessary disposition thereof. *Amendment allowed.*

To the amended bill the defendant answered, denying each and every allegation imputing an agreement between himself and the plaintiff for a joint interest in any business, not transacted under their written articles of partnership, in or in relation to lead, iron or cotton; denying that he ever procured any cotton by purchase or exchange of commodities; admitting his purchase of lead and iron, but alleging that it was on his sole and separate account; admitting that under a contract with the treasury department of the United States he collected, rebaled and transported the cotton, as a personal office of a public nature; denying any fraudulent use of money or credit of the firm, or time or services of its employees, and any fraudulent representations or fraud of any kind; denying any use of the credit of the firm in his private enterprises, and any injury of the business of the firm by said enterprises; denying any neglect of the business of the firm on his part; and finally, denying that it was in the power of either partner to license by his consent, or prohibit by refusal of his consent, any private enterprises of the other. The defendant also elected not to reopen the case for another hearing before the master upon the new issues; and it was again reserved, by *Colt, J.*, as follows: "The amendment of the plaintiff's bill being allowed, and the defendant having elected to offer no more evidence and not to have the case recommitted to the master, but to take the

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report of the master the same and with the same effect as if the bill was drawn originally as now amended, or the amendment had been allowed and filed before hearing before him, the case is reserved for the whole court upon the report and exceptions of the defendant thereto, as they now stand of record." Upon this reservation the case was argued in March 1872.

*Abbott & Browne*, (*Parmenter* with them,) for the defendant.

*Ranney*, for the plaintiff.

AMES, J. We have already decided, at an earlier stage of this case, that the controverted transactions in cotton, iron and lead were not within the scope of the written articles of association, and that, if the plaintiff is entitled to a share of the profits upon those transactions, it must be either upon the ground that they were undertaken or prosecuted by the defendant in violation of good faith towards his partner, or upon the ground that the parties made an agreement, independent of the written articles, that they should be matters of the joint account. The plaintiff has accordingly amended his bill in order to present his case in both these aspects. [Here followed, in the opinion, a discussion of the master's report and the evidence, which is omitted as relating solely to questions of fact; and the opinion concluded as follows:] It is true that every reasonable presumption is to be taken in favor of a master's report, upon questions of fact referred to him depending upon conflicting evidence. The report in this case was made before the amendment of the bill, and when the matter of investigation was presented not precisely in its present aspect. But if the report is to be interpreted as a finding by the master that the partnership between these parties was by mutual agreement extended so as to include the controverted transactions in lead, iron and cotton, or that it was a fraud upon the plaintiff's rights for the defendant to engage in them, we find such clear proof of mistake on the master's part as to require us to set aside his conclusion.

*Exceptions sustained.*

A final decree was rendered in favor of the defendant, for the sum found due to him by the master upon a settlement of the business exclusive of the transactions in lead, iron and cotton.

**ARNOLD W. CONANT & others vs. JOSEPH J. PERKINS & others.**

A. and B. were partners; and B. was a minor. Both of them knowing that the firm was insolvent, B. sold his interest in its property to A., who soon filed a petition for the benefit of the insolvent law individually and as a member of the firm. An assignment of the estate in insolvency was made, and certain creditors proved claims, with the understanding, and by a direction of the judge of insolvency, that the question whether they should be allowed against the estate of the firm, or A.'s separate estate, should be reserved for future determination. Pending these proceedings, B. became of age; and thereupon these creditors brought actions at law against A. and B. upon the same claims, and B. pleaded his infancy in defence. Pending the actions, the judge of insolvency, upon a petition of the assignees presented before the actions were brought, decreed, after hearing all parties in interest, that the funds in the hands of the assignees, including those derived from B.'s sale to A., were A.'s separate estate, and that the claims of the said creditors were provable only against the estate of the firm. No appeal was taken from the decree, and, with knowledge of it, these creditors, in their actions at law, discontinued against B. because of his defence, and recovered judgments against A. *Held*, that a bill in equity filed by them more than a year after the recovery of the judgments, for a revival of the decree of the judge of insolvency both as to marshalling the assets and determining against which estate their claims should be allowed, was filed too late.

GRAY, J. This proceeding, though somewhat irregular in form, is in substance and effect a bill in equity by creditors against the assignees of an insolvent debtor, addressed to this court in the exercise of its supervisory jurisdiction in equity over proceedings in insolvency, under the Gen. Sts. c. 118, § 16.

The facts material to the decision, as they appear from the bill, the report of the justice of this court by whom the case was heard, and the records of the court of insolvency which are made part thereof, are as follows :

In August 1862 Thomas J. Buffum, a minor, and John M. Elliott being partners in trade, and being insolvent, as both of them knew, Buffum sold his interest in the partnership property to Elliott, and received in payment therefor promissory notes payable to the order of his father, and delivered them to him.

In September 1862 Elliott filed his petition for the benefit of the insolvent law, representing himself to be insolvent, individually and as a member of the firm ; a warrant in insolvency was issued to take possession of his estate ; and, after due proceedings,

assignees were appointed and an assignment made to them ; and the plaintiffs and other creditors proved their claims, with an understanding and agreement, and by the direction of the judge, that the question whether the claims should be proved against the joint estate of Buffum & Elliott or the separate estate of Elliott should be reserved for future hearing and adjudication.

In March 1863 the assignees rendered their first account ; and presented to the judge of insolvency a petition, stating the amounts of the debts proved and of the funds in their hands, and facts tending to show that the sale from Buffum to Elliott was an unlawful preference ; and submitting to his consideration whether that sale was invalid on account of Buffum's minority, whether it did or did not convert the partnership property into the separate estate of Elliott, and whether the debts contracted in the name of the firm, but not binding on Buffum by reason of his minority, were or were not the debts of Elliott provable against his separate estate.

The judge of insolvency, after hearing all parties interested, decreed that the funds in the hands of the assignees belonged to the separate estate of Elliott and should be accounted for as such ; that the claims of the plaintiffs and certain other creditors were provable against the estate of Buffum & Elliott and not against the separate estate of Elliott, and the rest of the claims against the separate and not against the joint estate. This decree was dated and filed, and known to the creditors and the assignees, on January 31, 1865, and no appeal from it was taken by any party.

In November 1863 Buffum became of age. In December 1864 the plaintiffs and the other creditors whose claims had been thus proved and allowed against the joint estate, brought actions at law thereon in the superior court against Buffum and Elliott, in each of which Buffum pleaded infancy, and the plaintiffs at April term 1865 of that court discontinued against him for that cause, and recovered judgment against Elliott.

The plaintiffs filed the present bill in October 1866, alleging that the sale by Buffum to Elliott was an unlawful preference and void, and praying that the orders and decrees of the judge of insolvency might be revised, and that the claims of the plaintiffs

and others, which had been adjudged to be provable against the joint estate only, might be ordered to stand proved against the separate estate, and the funds in the hands of the assignee be distributed *pro rata* among all the creditors, or, in case these claims should be found by this court to be provable against the joint estate, that portion of the assets which belonged to the firm might be distributed *pro rata* among those creditors whose claims were upon contracts made with the firm.

Such being the facts, we are of opinion that the bill cannot be maintained in either of its aspects. It was the duty of the judge of insolvency to marshal the assets between the joint and separate estates, and to determine against which estate each claim should be allowed. Gen. Sts. c. 118, §§ 108, 109. At the time of the formal proof of the claims, the determination of this question was expressly reserved, and until it had been made the decree as to the proof of the claims was not complete in this respect. From so much of the decree of the judge of insolvency as marshalled the assets, no appeal would indeed lie, and the only remedy of any party aggrieved was by application to this court in equity under the Gen. Sts. c. 118, § 16. *Purple v. Cooke*, 4 Gray, 120. *Harmon v. Clark*, 13 Gray, 114. But the proper remedy of any party aggrieved by the final allowance or disallowance of any claim against either estate was by appeal within ten days to the superior court under the Gen. Sts. c. 118, § 84. *Ex parte Weston*, 12 Met. 1. *Fuller v. Hooper*, 3 Gray, 334. *Catskill Bank v. Hooper*, 5 Gray, 574. *Wild v. Dean*, 3 Allen, 579. Assuming however that the question against which estate the plaintiffs' claim should be proved, as well as that concerning the marshalling of the assets, was within the supervisory chancery jurisdiction of this court, the case stands thus: The plaintiffs brought their actions against Buffum and Elliott jointly, while the question whether it should be proved against the joint estate of Buffum & Elliott or against the separate estate of Elliott was still undecided by the judge of insolvency, and prosecuted those actions after they knew that he had allowed their claim against the joint estate only; and after Buffum had pleaded his infancy and thereby avoided his liability, and they had by reason thereof



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discontinued as against him and taken judgements against Elliott alone, they waited more than a year longer before applying to this court to revise the order of the judge of insolvency in either particular. The general rule is, that any bill in equity to correct a mistake in a judgment or award must, by analogy to the statutes regulating appeals and reviews, be filed within a year after the decision complained of, or, at the latest, within a year after discovering the mistake. Gen. Sts. c. 113, § 13; c. 117, § 12; c. 146, §§ 20, 21. *Plymouth v. Russell Mills*, 7 Allen, 438, 445. *Evans v. Bacon*, 99 Mass. 219. No special circumstances are shown to take this case out of the general rule; and the reasons for adhering to it apply with peculiar force in suits concerning the settlement of estates of insolvent debtors.

*Bill dismissed, with costs.*

*B. F. Brooks*, for the plaintiffs.

*W. A. Field & C. G. Keyes*, for the defendants.



### CHARLES S. HOMER vs. WILLIAM F. HOMER.

A firm, which had an account against A. B., brought action and recovered judgment thereon, and land of A. B. was sold on the execution, and bid off by W. F., one of the partners, in his own name, but with an understanding between him and his partners that he "should account with them for the interest in the land at its reasonable value." On the account of A. B. in the books of the firm, the expenses of the action and sale were charged, and the rents of the land credited, to the partnership. Upon the dissolution of the firm, C. S., to whom the firm was indebted, requested the partners to convey the land to him in discharge of his debt. W. F. wrote in the margin of A. B.'s account in the firm's ledger, "To W. F., he to pay C. S.;" and the other partners assigned to C. S., in writing, their interests in the land. The accounts between the partners were afterwards settled. *Held*, on a bill in equity filed by C. S. against W. F., to compel W. F. to convey the land to C. S., that there was no trust on the land in the hands of W. F., in favor of the other partners or of C. S.; and that an amendment, changing the bill into an action for money had and received, should not be allowed, although the parties had agreed that if C. S. could have relief upon the case stated he might have leave to amend accordingly.

**BILL IN EQUITY** to compel a conveyance to the plaintiff of land in Boston, or of the interest which had belonged to Matthias

E. Homer therein. Hearing before *Gray, J.*, who reported the case for the opinion of the full court, as follows :

"The defendant, and Lemuel E. Caswell and William C. Nicholson were copartners in business in Boston, under the firm of Homer, Caswell & Company, from August 1, 1857, to Ju'y 31, 1862, under articles of copartnership, by which the defendant and Caswell had each an interest of two fifths and Nicholson of one fifth, and which provided, among other things, that on the dissolution of the partnership all the partnership property, stock on hand, notes, outstanding debts and accounts, the books of the partnership, and the store in which their business might at that time be carried on, should remain in possession of the defendant or his legal representatives ; that he should have the settlement of the business of the partnership, and perform the same with diligence ; and that the other partners might assist in the settlement of the business, and should be entitled to receive any balance of capital invested therein, with the accumulated profits that might be due to them upon the settlement.

"From October 2, 1862, to April 6, 1867, when the accounts between the partners were finally settled, the defendant, as the partner charged with the settlement of the partnership business, and in behalf of the firm, employed his brother, the plaintiff, as an accountant and agent in making up the books and settling the business of the partnership with the copartners ; and also employed him during part of the time in other private and separate business of the defendant's own. For services which he rendered to the firm, the plaintiff received from the firm \$1000 in 1863, and \$160 on April 5, 1867.

"Upon the books of Homer, Caswell & Company was an account against Matthias E. Homer & Company, of Mobile, on which account two actions had been brought by Homer, Caswell & Company in the superior court, and judgments obtained therein in 1861, and executions were issued thereon, and were levied by sale of an undivided interest of Matthias E. Homer in the real estate in question in this suit, (subject to mortgage and other incumbrances,) which had been attached on the original writs, and which was bid off by the defendant at the sale on execution,

and conveyed by the sheriff to him in his own name, but upon an understanding between him and his copartners that he should account with them for the interest in this real estate at its reasonable value. Upon said account on the books of Homer, Caswell & Company, the expenses of these actions and sales on execution were charged, and the rents afterwards received during the continuance of the partnership were credited.

"In 1866 the plaintiff requested each of the partners in the firm of Homer, Caswell & Company that this account and interest in real estate might be transferred to him as compensation for the services rendered by him in settling the partnership accounts. Caswell and Nicholson executed a written assignment to him of their interest therein. The plaintiff testified that the defendant agreed that the plaintiff should have this account and interest in real estate in payment for his services, and that no other agreement about that account and interest was ever made between the plaintiff and the defendant. The defendant testified that he never agreed or assented to any such arrangement, but always said that he would take that account himself and settle with the plaintiff for his services. It was proved that the defendant at some time wrote with his own hand under that account, upon the ledger of Homer, Caswell & Company these words, 'To William F. Homer: he to pay Charles S. Homer.' The defendant afterwards, pending this suit, sold that interest in real estate, and never accounted for it or any share thereof to his copartners, or paid any part of the proceeds to the plaintiff.

"In October 1867, the plaintiff began an action of contract against the defendant for services rendered to him from October 2, 1862, to April 6, 1867, in which the plaintiff recovered judgment. At the trial of that action, the mutual accounts between the partners, and the account books of Homer, Caswell & Company, including the entries and memorandum on the account against Matthias E. Homer & Company, were introduced in evidence.

"The present bill was framed upon the theory that the plaintiff was entitled to said interest in real estate, or at least to three fifths thereof. I was of opinion and ruled that, upon the case above stated, the plaintiff could not maintain this bill in its pres-

ent form. If this ruling was incorrect, a decree is to be entered for the plaintiff, with costs. If it was correct, and the plaintiff upon any amendment of his bill could have relief upon the case stated, he is to have leave to amend accordingly, and upon paying costs to the defendant, and taking no costs himself to the time of the amendment, to have such decree entered, by reference to a master or otherwise, as equity may require. If he is not entitled to any relief upon the case stated, the bill is to be dismissed, with costs for the defendant. No objection was taken that his remedy, if any, should be by a new action at law; both parties desiring that their rights should be finally determined in this suit."

*R. D. Smith*, for the plaintiff. 1. The mere taking of the land in the defendant's name does not make it partnership property, although it was paid for by the firm's money; but by taking it for a firm debt, and treating it as firm assets, by charges and credits, a trust is impressed upon it, evidenced by the writing of the defendant on the books. *Buck v. Swazey*, 35 Maine, 41. *Richards v. Manson*, 101 Mass. 482. *Botsford v. Burr*, 2 Johns. Ch. 405. *Forsyth v. Clark*, 3 Wend. 637, 651. *McGowan v. McGowan*, 14 Gray, 119. *Harmon v. Clark*, 18 Gray, 114, 121. *Baker v. Vining*, 30 Maine, 121. *Bragg v. Paulk*, 42 Maine, 502. *Pratt v. Thornton*, 28 Maine, 355, 360. *Titcomb v. Morrill*, 10 Allen, 15, 17. 2 Story Eq. §§ 964, 972. Any understanding of the partners that the defendant should account for the land to his copartners cannot control an express trust. *Bartlett v. Bartlett*, 14 Gray, 277. *Buck v. Dowley*, 16 Gray, 555. Gen. Sts. c. 100, § 19.

2. If necessary, an amendment should be allowed. *Neale v. Neales*, 9 Wallace, 1. *Dearth v. Hide & Leather National Bank*, 100 Mass. 540. *Stevens v. Warren*, 101 Mass. 564.

*G. F. Homer*, for the defendant.

MORTON, J. This is a bill in equity in which the plaintiff seeks to compel the defendant to convey to him certain real estate therein described. The plaintiff bases his claim upon two grounds. The first is, that it was agreed by all the members of the firm of Homer, Caswell & Company that the plaintiff should

have the real estate as compensation in part for his services in settling the affairs of the firm, and that the defendant holds the whole estate in trust for the plaintiff. The second is, that the defendant held the estate in trust for the partnership, and that by the transfer to the plaintiff, by the junior partners, of their interest in the account against Matthias E. Homer & Company, he was substituted to their rights, and thus is entitled to three fifths of the land in question. We are of opinion that neither of these claims can be sustained.

As to the first, it is a sufficient answer that there is no proof that the defendant agreed that the plaintiff should have the estate. But if this were otherwise, there is no instrument in writing signed by the defendant creating or declaring a trust concerning this land. Gen. Sts. c. 100, § 19. The memorandum upon the ledger of the firm is entirely insufficient as a declaration of trust. It does not describe the land; if it is to be deemed to refer to the land, it does not indicate an intention to hold it in trust; but the more natural import of its language is, that the defendant is to hold the land as his own and pay the plaintiff for his services.

It is equally clear that the second position taken by the plaintiff cannot be sustained. There is no written memorandum signed by the defendant creating or declaring a trust concerning the land. An implied or resulting trust, in favor of the firm, will not be created, in a case like this, unless it appears that the purchase of the land was made for the firm and for its use. In this case, the proof is plenary, that it was the understanding of the partners that the defendant should take a conveyance of the land for his own benefit, and should account with the other partners for the proceeds or reasonable value of it. Upon these facts, no implied or resulting trust arises in favor of the partnership. *Richards v. Manson*, 101 Mass. 482.

It is clear therefore that the plaintiff cannot maintain his bill in its present form.

The report provides that if the plaintiff, upon any amendment of his bill, could have relief upon the case stated, he is to have leave to amend accordingly, and upon paying costs to the defend-

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ant, and taking no costs himself to the time of the amendment, to have such decree entered, by reference to a master or otherwise, as equity may require. Upon the case stated, we see no ground of liability of the defendant, unless it be that the plaintiff is entitled to recover of him three fifths of the proceeds of the land in question. If the two junior partners assigned to the plaintiff their interest in the proceeds of the land, and the defendant assented thereto, it would seem that the plaintiff is entitled to recover three fifths of such proceeds, unless his claim is barred by the judgment in the former suit between these parties. For this he could maintain an action of contract. The only change he can make in the pleadings in this suit, to present this claim, is to strike out substantially all the allegations of his bill and substitute averments which would be equivalent to a declaration for money had and received. We think that such a case does not come within the scope or spirit of our statutes of amendments. Under these statutes, amendments are liberally allowed, where they are necessary to enable the plaintiff to sustain the action for the cause for which it was intended to be brought. But in this case the only change which could avail the plaintiff, upon the case stated in the report, is the substitution of a cause of action different from the one for which the suit was intended to be brought, and which is properly cognizable at law and not in equity. We are of opinion that such an amendment ought not to be allowed.

*Bill dismissed.*

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WILLIAM R. DUFF vs. JAMES MAGUIRE & others.

The plaintiff and the five defendants, by an instrument signed by them, reciting that, desiring to obtain and work a gold mine, they appointed the plaintiff their agent to go to California and make such investigations of mines as he might see fit and report, agreed that they would pay \$100 each to defray his expenses to California, and that upon his recommendation, if satisfactory to a majority of the subscribers, they would raise proportionately the money necessary to put the mine in working order; and he agreed that, if it should be decided to work the mine he might recommend, he would leave the question of his salary open, to be decided when he should have placed the mine in working order. The subscribers also wrote a letter to him, in which they stated that it was expected of him to visit the mines in the various localities, and to avail himself of the aid of one or more of the most competent judges of mining property, before reporting; that he could

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not be too particular in giving all the points upon which he based his decision; that the matter of his compensation was to be left to be arranged in the future; and that he was to understand that, whatever mine they should decide to accept, it would be with the understanding that he should act as the superintendent. The plaintiff went to California, and selected a mine; but the defendants then abandoned the undertaking. *Held*, that the plaintiff was entitled to recover five sixths of such a sum as would reimburse to him his fair and reasonable expenses, and be a fair compensation for his services, although the sum should exceed the amount raised by the payment of \$100 each by the subscribers.

**BILL IN EQUITY** against James Maguire, Jeremiah Pritchard, Joseph Hobart, William H. Dunbar and John Wooldredge, praying for a decree to compel the defendants to contribute towards reimbursing to the plaintiff his expenses, and making a fair compensation to him for his services, incurred or rendered in a business undertaking. The case was reserved by *Ames, J.*, on the bill, the answers, the report of a master to whom it was referred to find the facts, and the defendants' exceptions to his report, for the determination of the full court; and the material facts were as follows:

The plaintiff and the defendants signed this agreement on the date thereof: "Boston, June 15, 1866. We the undersigned, desirous of obtaining and working a gold property, do appoint Mr. W. R. Duff, our agent, to proceed to California and make such investigations of mines as he may see fit, and report. And upon his recommendation, if satisfactory to a majority of the subscribers, we and each of us agree to raise the necessary amount of money, proportionately, to put the property in working order. And we further agree to pay the sum of one hundred dollars each to defray said Duff's expenses to California; and further, upon Mr. Duff's report should it be decided to erect machinery upon the property he may recommend, he agrees to leave the question of his salary open, to be decided when he shall have placed the mill and property in working order. And it is further understood that each subscriber hereto is not bound for a sum to exceed five thousand dollars currency."

On the same day, the plaintiff received a letter addressed to him and signed by Maguire "for subscribers to agreement," of which the material parts were as follows: "As you are about to take your departure for California with a view to prospecting and

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examining mining properties, and reporting to us the result of your investigations relating to the purchase and working thereof, and as you are to be equally interested with ourselves in whatever property we may see fit to accept, it is due to you that you should be made acquainted as much as possible with our feelings and wishes in relation to the objects we have in view in employing you as our agent. It is the desire of all the gentlemen associated with you that you should be successful in finding a valuable property that will cost but little money, and it is expected of you that, before you report, you will visit the mines in the various localities, and that you will avail yourself of the aid and opinions of one or more of the most competent and reliable judges of mining property before making the decision upon which you are to base your report. You cannot be too particular and specific in your report to give all the points upon which you base your decision, such as the location and extent of the mine, width of the lead and quality of the ore, the amount of work that has been done on the mine, the title, cost of wood, water facilities, and every other favorable or unfavorable circumstance that you may learn in connection therewith. You will, of course, make a clear and explicit statement or estimate of the amount and cost of all the machinery that you may need to put the property in working and paying order, and probable time required to accomplish the work. You are aware from the repeated conversations you have had with us, that in going into an enterprise of the nature specified herewith our object is to obtain, with the least possible outlay, a large paying property, and that we do not wish to be subjected to any experimental scheme, or even to place our money in certain small paying investments. We are confident that there are abundant opportunities to secure properties that will return us from 50 to 100 per cent. per annum on our money, and it is such as these that it is desirable you should secure." "The matter of your compensation is to be left to be arranged in the future. All it is necessary for us to remark in this connection is, that we are disposed to do justly by you and pay you as well as others are paid occupying similar positions, and assure you we cannot believe there will be any difficulties arising upon this point. In corresponding



with us you will please address your communications to Mr. Maguire. In conclusion, you are to understand that, whatever property we decide to accept, it is with the understanding that you are to act as the general superintendent and chief manager." This letter was written with the assent of all the defendants, and \$500 was subscribed by the defendants and delivered to the plaintiff on June 20, 1866.

The report found that the plaintiff consented to go, on the assurance that his expenses should be paid by the subscribers to the agreement, made by a person professing to be authorized by the defendants, but, in truth, not so authorized; that "the plaintiff sailed from New York for California June 21, 1866, and returned to New York about December 25, 1866, and during all that time was fully and properly employed in making the passages to and from California and in rendering services in California under the agreement and letter of instructions; that on his arrival in California he proceeded with diligence and in good faith, and with competent skill and judgment, to make investigation as to mining properties in different parts of the country, and personally to inspect numerous mines, for the purpose of selecting one which should be suitable for purchase and acceptable to his associates; and that in all his doings he conducted himself with entire fidelity to their interest."

The plaintiff in August 1866 recommended to the defendants by letter the purchase of three mining estates, but the defendants, on receipt of the letter, notified him by telegraph that the subscribers declined to accept the recommendation and decided to abandon the scheme entirely; and the report found that the defendants abandoned the scheme, not for the reason that the property recommended for purchase was not within the original scope of their association, but "because the defendants, from caprice, or from distrust of the plaintiff, or from a more mature and deliberate reflection, had determined not to invest in a mining operation under his direction."

The report found that the plaintiff's charges, "for the fair and reasonable expenses" incurred by him as agent for the subscribers, were correct, with the exception that \$78.45 were expended

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after he had notice of the abandonment of the scheme ; and that his services were worth \$300 a month, or \$1800 in all. The substance of the defendants' exceptions to the report appears in the opinion.

*C. Allen & W. G. Colburn*, for the plaintiff.

*A. A. Ranney*, for the defendants.

AMES, J. The agreement under which these parties have acted, although it left it entirely at the discretion of the subscribers, upon the receipt of the report which the plaintiff was to make, whether they would prosecute or abandon the contemplated mining operation, was an unconditional stipulation that the preliminary investigations in California should be made by the plaintiff on their joint account, and for their joint benefit. It must have been understood that this investigation would occupy a considerable length of time, and would be attended with considerable expense. The instructions to the plaintiff required that he should "visit the mines in the various localities ;" that he should obtain the opinion and aid of "competent and reliable judges of mining property ;" that he should make a thorough and careful examination, and should make a report, in which, he was told, he could not be "too particular and specific" in giving all the points upon which he should base his decision. He was to find a valuable property, and to furnish them with such information respecting it that they should be able to judge for themselves whether it would be for their interest to go on with the enterprise. The report finds that he accordingly went to California, and "proceeded with diligence and in good faith, and with competent skill and judgment," to execute his commission ; that his charges for his "fair and reasonable expenses" as such agent are correct, and that six months of his time were "fully and properly" occupied in making the journey and rendering the services required by his instructions. The association saw fit not to make the investment which he advised. It has had, however, the benefit of his services and expenditures, and should equitably be charged with them, unless some reason why they should not be so charged can be found in the terms of the association or in the letter of instructions, or in the legal relations of the parties to each other.

The defendants insist that the proper inference from the language of those documents must be, that the plaintiff was not entitled to anything on account of his expenses beyond the sum of \$500, which they have already paid ; and that he was to receive no compensation whatever for his time and services in any event, unless a majority of the subscribers should accept the mining property which he should bargain for and recommend, and unless they should also determine to erect machinery upon the property and put it in working order. But we do not so construe the contract. The stipulation that they should pay the sum of \$100 each was in order to defray his travelling expenses "to California;" and that sum was barely sufficient to pay the expense of travelling to San Francisco and back, leaving little or nothing for the expense of visiting the mines and doing the business which was the sole object of the journey. Under the contract, that amount was due on demand and in advance, before he had started on the journey. There is nothing that indicates that he was expected to keep his expenses within that sum, or that the expenses in California were to be at his exclusive cost, and it appears that he did not start upon the journey upon any such understanding. We see no ground whatever for the claim that the payment of \$100 each was to be understood as relieving the defendants from any further payment, necessary to complete their equal and just proportion of the plaintiff's fair and reasonable expenses in the execution of his commission.

With regard to the compensation for the plaintiff's services, it is true that, with the exception of the general profession of a disposition to deal justly with him, and to have no difficulty on the subject, the only express promise refers to a state of things which has not arisen. If it should be decided to erect machinery upon the property which he should select and recommend, the question of his "salary" was to be left open, to be decided when he should have placed the mill and property in working order. The letter assures him that he should be paid as well as others occupying similar positions ; "whatever property we decide to accept, it is with the understanding that you are to act as the general superintendent and chief manager." It appears to us that all these

expressions must be understood as indicating what the association would be willing to do, if they should adopt the plaintiff's recommendation and go forward with the enterprise ; and that they do not refer and are not applicable to the contingency, which has actually occurred, of a breaking down of the scheme in consequence of their refusal to go on with it. The contract and the letter are both entirely silent as to what is to be done in that event. A promise to pay a regular salary to the plaintiff as the superintendent and manager of a proposed business, if it should be decided to go into it at all, does not necessarily import that, if the project should be given up, he is not to be paid for valuable services, rendered at their request, in obtaining and reporting the information upon which they are to found their decision. We find nothing in the contract or the instructions, which, either in express terms or by necessary implication, imports that the plaintiff was to work for nothing if the enterprise fell through. He undoubtedly expected to obtain the position of superintendent, if the scheme should be carried out, and was willing to risk something under that expectation ; but we see no ground for saying that he ever agreed to take upon himself more than his just and equal proportion of the loss, upon the failure of the enterprise.

The objection that one partner in a joint adventure cannot charge a compensation for his services in the joint business does not appear to us to be applicable to the case. The subscribers to the contract had not become partners in a joint undertaking when the plaintiff started on his journey, and it was wholly uncertain whether they would become so or not. It was thought necessary, before deciding that question, that certain information should be obtained and laid before them, and they accordingly made the plaintiff their agent to do the whole of that needful preliminary business. A compensation is necessarily and equitably implied under such a special arrangement, and they stand in the same position as if they had employed a stranger. *Bradford v. Kimberly*, 3 Johns. Ch. 431. *Bradley v. Chamberlin*, 16 Verm. 613.

Our conclusion therefore is, that, with the exception of the charge of \$78.45, expended after he had received notice by tele-

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graph of the proposed abandonment of the scheme, the plaintiff is entitled to recover of the defendants five sixths of the amount of the expenses charged and allowed by the master, less the sum of \$500 already paid by his associates and \$100 chargeable as his proportion of the advance; and also five sixths of the sum of \$1800 allowed by the master for his services, with interest and costs.

*Decree accordingly.*

**BENJAMIN S. BINNEY vs. CHARLES F. ANNAN & another.**

The inventor of a machine agreed with a mechanic, that the latter should perfect it, procure a patent for it, and assign the patent to him. The mechanic procured the patent, but refused to assign it. *Held*, that this court had jurisdiction in equity to compel the assignment.

BILL IN EQUITY praying for a decree to compel the assignment of letters patent, and for an account. The defendants demurred, on the ground of want of jurisdiction. The case was reserved by the chief justice, on bill and demurrer, for the determination of the full court, and is stated in the opinion.

*B. Dean*, for the defendants.

*T. W. Clarke*, for the plaintiff.

MORTON, J. The bill states a case which entitles the plaintiff to relief. It sets forth, in substance, that the plaintiff was the proprietor of a new and useful invention for a machine for making paper bags, and that, for the purpose of perfecting the invention and procuring patents therefor, he employed Annan, a skilled mechanic, under a written contract, by which Annan was to labor for the plaintiff in perfecting said machine, to take all necessary steps to patent any inventions or improvements relating to paper bags or any machinery therefor, and to assign to the plaintiff all his rights therein, and all patents therefor. It alleges that Annan has taken out several patents for inventions made by him on paper bag machines, which were issued to himself and the other defendant, Herbert S. Merrill, as his assignee; and that he and Merrill became confederates to defraud the plaintiff, and are mak-

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*Emery v. Parrott.*

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ing and selling machines under said patents, in fraud of the plaintiff; and it prays that they may be required to assign the said patents and machines to him, and to account for the profits made by them in the manufacture and sale of such machines. The defendants demur to the bill, and attempt to sustain their demurrer upon the ground that the question raised by the bill is one exclusively within the jurisdiction of the federal authorities, and therefore cannot be entertained by this court. Their argument is, that the plaintiff seeks relief upon the ground that he, and not Annan, was the original inventor of the machines for which patents have been issued, and that upon this question the decision of the commissioner of patents is conclusive. We do not so understand the allegations of the plaintiff's bill. The plaintiff does not allege that the patents obtained by Annan are invalid. On the contrary, he puts his case upon the ground that they were rightfully obtained by Annan, and ought to be assigned to him according to the agreement between the parties. There is no conflict involved between this court and the federal tribunals. No question is raised as to the legality or propriety of the action of the commissioner of patents, nor are we asked to revise it; but the plaintiff seeks to enforce the performance of a contract for the conveyance to him of the patent rights and machines. The question raised by the bill and demurrer is one of which the commissioner of patents could not entertain jurisdiction, but which is within the cognizance of the state courts.

*Demurrer overruled.*

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**JAMES W. EMERY & others vs. WILLIAM P. PARROTT & another.**

If a resident of another state becomes insane pending a suit in equity against him in this Commonwealth, the appointment by the court of his counsel to be his guardian *ad litem* justifies proceeding without notice to a guardian previously appointed in the state of his domicile.

In a suit in equity to compel the defendants to account for shares in the stock of a corporation, alleged to have been obtained by them in fraud of the plaintiffs, wherein it is decreed that one of them, while acting as agent of the plaintiffs, united with the other

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who knew of that relation, as partners in obtaining the shares, to which the plaintiffs were in equity entitled, they are liable to account therefor both jointly and severally may be decreed to replace the shares to the plaintiffs, to the extent of other like shares held by them at the time of the filing of the bill; and if one of them dies after the said interlocutory decree, and while the case is referred to a master to state the account, and the other is fully heard before the master and afterwards before the court on exceptions to his report, the final decree for the plaintiffs should be entered *non pro tunc*, as of the date of that decree.

BILL IN EQUITY filed May 16, 1866, by James W. Emery, Estes Howe, Joseph H. Converse and Gardiner G. Hubbard, all described as of Boston in this Commonwealth, against William P. Parrott, also of Boston, and Stephen H. Head, of Maine, com-morant in Boston, to compel the defendants to transfer to the plaintiffs certain shares in the capital stock of the Glace Bay Mining Company, a corporation chartered by the province of Nova Scotia, and to account to the plaintiffs for profits realized upon said shares in fraud of them, and reimburse to the plaintiffs their damages in consequence of the fraud, the allegations of the nature and circumstances of which were briefly as follows :

That in the spring of 1861 Edward P. Archbold, who owned a coal mine at Glace Bay near Sydney in Nova Scotia, communicated to the defendants, at Boston, his desire to sell the mine and form a company to buy and work it, and at or about the same time promised Head a commission of either fifteen or twenty per cent. of the capital stock, if he should organize such a company ; that Head communicated the promise to Parrott, and requested him to select some capitalists in Boston for the purpose, and aid in organizing a company, and agreed to share the commission with him equally for his services ; and that this agreement of Head with Parrott was communicated to Archbold before the plaintiffs entered into any contract in respect to the mine ;

That in August 1861 Parrott, who was known to some of the plaintiffs as an engineer of high repute, submitted to them a proposition to buy Archbold's mine, representing that the only question as to its great value depended on the practicability of opening a good harbor near it for the shipment of the coal, and offered to join with them in making the purchase, if it could be made advantageously, and to visit the mine with them ; and that

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the plaintiffs expressed themselves willing to engage in the matter with him, if on examination the mine should appear as valuable as was represented, and a good harbor could be made, and the property could be bought for a fair price ;

That Parrott communicated these negotiations to Head, and a correspondence ensued between them and Archbold, in which Archbold wrote to Parrott that the terms on which he would be willing to have a company formed would be, that he should retain fifty per cent. of the whole stock, when the mine was properly equipped with every requisite for a large business, and should have the agency of the company in Nova Scotia, and wrote to Head to the same effect, and that out of this fifty per cent. "you and the parties promoting the scheme are to get fifteen per cent., leaving me thirty-five per cent. as my share ;"

That in September and October 1861 the plaintiffs and Parrott visited the mine, and Parrott made examinations and reported to them favorably as to opening the harbor, and Parrott and the plaintiff Howe were appointed a committee of the associates to confer with Archbold, and did confer with him, concerning a purchase of the mine by them, but without reaching any result ;

That later in October 1861 Archbold came again to Boston, and Parrott and Howe, who continued to act as a committee in behalf of the associates, continued the negotiations with him, which then resulted in a draft of a contract for the sale of the mine by Archbold and its purchase by the associates, most of the details of which were arranged by Parrott, who assured his associates that he did the best he could for them and obtained from Archbold his best terms ;

That, in order to ascertain what would be the cost of opening a harbor and providing apparatus to work the mine, the plaintiffs requested Parrott to make and furnish estimates thereof before entering into any contract with Archbold, and Parrott did so, estimating it at \$56,000 ; but that the actual cost thereof subsequently proved to be more than \$75,000 ;

That the written contract was signed and sealed, under date of November 1, 1861, by Archbold as party of the first part, and



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the plaintiffs and Parrott as party of the second part, and provided, among other things, that the parties should apply to the general assembly of Nova Scotia for a charter as a mining corporation, that upon obtaining it the capital stock should be fixed at the sum of \$150,000, half of which should be subscribed by the party of the first part, and half by the party of the second part, and that the corporation should buy the mine for \$75,000, spend \$70,000 in opening a harbor and providing apparatus for working the mine, and reserve the other \$5000 for working capital ;

That the provisions of this contract were substantially carried out, and the corporation was chartered under the name of the Glace Bay Mining Company, and duly organized in September 1862, and the mine conveyed to it, and certificates of its stock to the amount of \$75,000 were issued to Archbold ;

That, at or about the time when Archbold received the certificates, Parrott, in Head's presence, suggested that he should take them out in such a form that the amount of stock to be paid by him to the defendants under his agreement with Head could be apportioned equally, and made a calculation of the amount of stock due from him, and a memorandum of the proportion in which it should be divided, and gave him this memorandum, and thereupon he transferred 112 shares of his stock to Parrott, and 113 shares to Head, the same representing fifteen per cent. of the whole capital stock of \$150,000 ;

That since that time various stock dividends had been declared by the corporation, whereby its capital stock had been enlarged to \$600,000, and various cash dividends had also been declared, and the defendants received their proportions thereof ;

That in February 1865 Head sued Archbold in the circuit court of the United States for 75 more shares of the original stock, and the dividends thereon, alleging that his agreement with Archbold was for twenty and not fifteen per cent. of said stock ;

And that neither of the defendants ever disclosed to the plaintiffs the agreement between Archbold and Head, or their agreement with each other, and the first knowledge the plaintiffs ever had thereof was by Parrott's testimony as a witness in Head's suit against Archbold ;

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And the bill charged that while Parrott was acting as agent of the plaintiffs, in his negotiation as committee man, in their behalf, with Archbold, in purchasing the property, and as their engineer in examining the mine and harbor, and making plans and estimates of the expense of opening the mine and harbor, he was at the same time acting as the agent of Archbold in selling the same property ; and that, while he was acting as the partner and agent of Head in organizing the company and selling the property, and participating with him in the commissions paid by Archbold for those services, he was at the same time acting as the agent and partner and joint associate of the plaintiffs in purchasing the property ; that Head well knew all the negotiations of Parrott with the plaintiffs, and that he had taken an equal interest with them in the enterprise and was their partner therein ; that Parrott, by executing the contract of November 1, 1861, together with the plaintiffs, became a partner with them therein ; that Parrott and Head became partners in Head's contract with Archbold ; that Parrott, while so a partner with Head in selling the property, became the agent and partner of the plaintiffs in purchasing it ; that these acts and doings were a fraud on the plaintiffs ; and that thereby said partnership of Parrott and Head became liable to account to the plaintiffs for four fifths of the stock received by them, and all dividends declared and paid to them thereon.

The defendants answered separately ; the plaintiffs filed a general replication ; and the case was reserved by *Wells, J.*, for the determination of the full court, on the pleadings and a report of testimony taken under an agreement of the parties, and was argued in November 1868.

Before the reservation, upon the suggestion of the plaintiffs' counsel that Head had become insane pending the suit, and their motion that his counsel of record be appointed his guardian *ad litem*, Charles L. Woodbury, Esq., was so appointed on February 26, 1868. By an exhibit annexed to the report of the testimony, it appeared that, sixteen days before this appointment, Head was adjudged insane by the probate court of Kennebeck County in the state of Maine, and was described in the judg-

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ment as of Augusta in that county, and a guardian residing at Augusta was appointed for him by that court.

After the reservation, and before the argument, Parrott died, and his executor appeared and took upon himself the defence of the suit.

*S. Bartlett & H. W. Muzzey*, for the plaintiffs.

*B. R. Curtis & C. L. Woodbury*, (*M. E. Ingalls* with them,) for the defendants.

BY THE COURT. The questions in this case chiefly relate to matters of fact; and in causes of this description the court ordinarily regard it as sufficient simply to state the conclusions at which they have arrived.

From a careful study of the voluminous testimony, we are satisfied that the defendant Parrott was engaged in a common enterprise with the plaintiffs, and likewise acted as an agent on behalf of all the associates to purchase the Glace Bay coal mine. While acting in this capacity he secretly stipulated for certain private advantages to himself, in the shape of commissions from the vendor of the mine. And he obtained these commissions while his associates had a right to expect that he would effect and was effecting the best bargain he could for them and himself jointly and on terms of equality. Benefits and advantages thus obtained the principles of equity will not allow him to retain for himself. He must account for them and share them with his associates, the plaintiffs.

The case of the defendant Head stands somewhat differently, but is governed by the same general principles. He did not stand in any fiduciary relation to the plaintiffs. But he knew the position of Parrott, and became the partner of Parrott, uniting with him to effect a sale of the property to Parrott and the plaintiffs, for the sake of dividing with Parrott the secret commission which the owner of the property had agreed to pay for effecting the sale. He was thus fully cognizant of the illegal conduct of Parrott, and coöperated with him in inducing the plaintiffs to make the purchase. He participated in the profits of the transaction; and the court are of opinion that he as well as Parrott must disgorge the secret gain which they thus jointly obtained and divided with each other.

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The result is, that the plaintiffs are entitled to a decree that the shares of stock which Parrott and Head received as commissions must be shared by them with the plaintiffs, and all dividends which have accrued upon the shares must also be accounted for. We arrive at this conclusion without considering the evidence objected to by the defendants.

The case is to be referred to a master to state the account and report the form of a decree proper to be entered.

*Ordered accordingly.*

That order was made on November 24, 1869; and the master was appointed on January 22, 1870. At the first hearing before him, on September 8, 1870, it was admitted that Head had died at Baltimore in Maryland, on February 18, 1870, and the guardian *ad litem* appointed for him in 1868 stated that he had no authority to represent him or his personal representatives; and no person appeared to represent him or his estate at any of the hearings before the master. Before further proceedings, after the suggestion of Head's death, Parrott's executor protested against any such proceedings, for the following reasons:

“For that the record of the cause discloses that the defendant Head, at the time of service of process therein, was a citizen of the state of Maine, and also that he became insane before the testimony had been completely taken, that a guardian was appointed for him by the probate court of Kennebeck County in Maine, who was a citizen of Maine, and afterwards, without citing the said guardian, this court appointed a guardian *ad litem*, who was a citizen of Massachusetts, on the motion of the plaintiffs, and proceeded to hear the cause; and that now the record of proceedings before the master discloses that Head died insane at Baltimore in Maryland, before any proceedings under this order of reference were had by the master, and after the order of reference was made; and this defendant executor excepts, for that, the Constitution of the United States having declared that the judicial power of the United States shall extend to controversies between citizens of different states, and the statutes of the United States having extended the jurisdiction of the courts of the United States to

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include at the option of the citizen of another state all such controversies, in manner as in said statutes described, this court had no authority to appoint for the insane defendant Head a guardian *ad litem* who was a citizen of this state, and that Head was not lawfully represented at said hearing before the court, and that the said decree and opinion of the court were improvidently made and had, and are void for want of jurisdiction over said Head.”

“On the facts as above set out, the said defendant executor further excepts, that there is now no representative of Head a party in this cause, and that the master cannot lawfully under the said order of reference, made before the death of Head, take any account in or do any of the acts referred to him, and should so report for the further order of the court in the premises.”

The plaintiffs contended that the hearing should proceed notwithstanding this protest; and the master so ruled, and proceeded with the hearing, and found that the number of shares received by Head and Parrott from Archbold were respectively, as alleged in the bill, 118 shares and 112 shares, and that they received them in September 1862; that “at the beginning of this suit Head held and owned 290 shares, the whole of which were either the original commission shares received by him as aforesaid, or shares accruing as dividends or by way of profits or rights” thereon; that “at the beginning of this suit, and at the time of his death, Parrott held and owned 678 shares, of which 480 shares were received from other sources than as aforesaid;” and that, both at the beginning of this suit, and on November 24, 1869, the date of the interlocutory order therein, Parrott and Head were jointly and severally liable to the plaintiffs for four fifths of 900 shares of the stock, that is to say, for 720 shares, “being four fifths of the whole amount of said commission shares with the accruing dividends and profits as received in stock.” He also found what additional amounts in money the defendants were liable for, on account of cash dividends received upon the 720 shares, at the beginning of the suit and on November 24, 1869, respectively.

After stating these proceedings and findings, the master reported "that, on account of the death of the defendant Head, and the present condition of his estate with reference to this suit, the master has thought it proper to await the further order of the court before presenting the draft of a final decree;" and he annexed to the report exceptions alleged thereto by Parrott's executor, part of which related to questions of fact, and the points of those relating to questions of law were substantially as follows:

*First.* That all the proceedings after the suggestion of Head's insanity were void for want of jurisdiction over him.

*Second.* That Head and Parrott are not liable jointly, but severally, if at all.

*Third.* That if any final decree for the plaintiffs can be made, it can only compel the specific transfer to the plaintiffs of such shares received by the defendants as commissions, as they possessed at the date of the filing of the bill.

The case was heard by the chief justice on the report and exceptions, and reserved for the determination of the full court.

*Woodbury*, for Parrott's executor.

*Bartlett*, for the plaintiffs.

BY THE COURT. 1. The appointment of Mr. Woodbury, who had previously acted as counsel for Head in the cause, to be his guardian *ad litem*, upon its being suggested that he had become insane pending the suit, was according to the usual chancery practice, and justified proceeding with the suit against Head, without notice to the guardian appointed in another state. The former decree was therefore binding upon Head as well as Parrott at the time it was entered.

2. By that decree it was determined that Parrott, while holding the relation of agent to the plaintiffs, and Head, knowing of that relation, united as partners in obtaining shares of stock in the Glace Bay Mining Company, to which the plaintiffs were in equity entitled. Parrott and Head were therefore jointly and severally liable to account to the plaintiffs for all such shares obtained by them as the profits of that fraud, and for the dividends subsequently accruing upon those shares. 1 Lindley on Part. (2d ed.) 376, 377. Story on Part. §§ 108, 166.

3. The shares thus fraudulently obtained by the defendants, and belonging in equity to the plaintiffs, should be replaced to the extent of the other shares held by Parrott and Head at the time of the filing of the bill. 2 Story Eq. §§ 1263, 1264.

4. Head having died since the case was fully argued and an interlocutory decree made upon the merits and the case referred to a master to state the account, and Parrott, his surviving partner, having been fully heard before the master and before the court on exceptions to his report, a final decree for the plaintiffs should be entered *nunc pro tunc* as of the date of that interlocutory decree. *Campbell v. Mesier*, 4 Johns. Ch. 334, 342 note. *Bank of United States v. Weisiger*, 2 Pet. 331, 481.

All the exceptions to the master's report are therefore overruled, and the case recommitted to him to report the form of a

*Final decree for the plaintiffs accordingly.*

### FERGUS LANE vs. ATLANTIC WORKS.

In a city where there was an ordinance prohibiting the standing of trucks in any street more than five minutes at a time without a proper person to take care of them, or more than twenty minutes at a time in any case, an ironfounder, between three and four o'clock in the afternoon, put in the street in front of his foundry, where he knew that children were accustomed to play, a truck, with a hot iron casting, weighing nine hundred pounds, upon it, with the intention of leaving it there over night. Three hours later, two children, one of them seven years and three months old, and the other eight years old, were passing along the street on their way home, when a third boy, twelve years old, not in their company, called to them to come over and see him move the truck. They stopped to see him; and within half a minute afterwards, upon his moving the tongue of the truck slightly, the casting rolled off and fell on the younger boy and injured him. The casting was not trigged upon the truck, and was of such a shape as to roll off easily. The wheels of the truck were not trigged; and when it was put in the street its tongue was so placed that a slight movement of it was sufficient to displace the casting. When the two boys stopped, they stood at first between the truck and the foundry, which adjoined the street; and it was by the direction of his companion that the one who was injured left that position and went into the carriage-way on the other side of the truck, where the casting fell on him. *Held*, in an action against the ironfounder by this boy for his injury, that the questions of the plaintiff's care and the defendant's negligence were for the jury; as also the question whether the plaintiff participated in the wrongful conduct of the boy who moved the truck; and that, if the defendant was negligent in leaving the truck in the street, or leaving it insecure, and the

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occurrence by which the injury was received was one which might have reasonably been apprehended as the result of such negligence, and in fact the result thereof, and the plaintiff used due care, the wrongful conduct of the boy who moved the truck would not relieve the defendant from liability, although it contributed to the result.

TORT. The declaration was as follows: "And the plaintiff says that the defendants carelessly left a truck, loaded with iron, in Marion Street, a public highway in Boston, for the space of twenty minutes and more; and the iron on said truck was so carelessly and negligently placed that it would easily fall off; and the plaintiff was walking in said highway, and was lawfully in said highway, and lawfully using said highway, and in the exercise of due care; and said iron upon said truck was thrown and fell therefrom upon the plaintiff in consequence of the defendants' carelessness, and the plaintiff was severely bruised and crippled," &c. The answer was a general denial of the plaintiff's allegations.

Trial in the superior court, before *Reed, J.*, who made the following report thereof:

"There was evidence tending to show that the defendants were a corporation manufacturing heavy iron machinery at works located on Chelsea, Marion and Bremen Streets in East Boston, coming out even with the line of each street; that Marion Street, where the injury occurred, was a public highway fifty feet wide; that between three and four o'clock in the afternoon of May 31, 1869, the defendants placed in this street, from five to ten feet from their works, a four-wheeled iron truck with a long handle or tongue, containing upon it a piece of iron weighing about 900 pounds, the small end of which was then so hot that it would take an hour and a half to cool, and which had been placed on the truck by the aid of a crane, with the intention of letting the truck and iron remain there over night.

"An ordinance of the city of Boston, which was introduced in evidence, prohibited trucks or vehicles of any kind, whether loaded or unloaded, and whether with or without horses, from stopping in any street more than five minutes without some proper person to take care of the same, or more than twenty minutes in any case.



" There was evidence tending to show that the street was nearly level, where the accident happened, and unpaved ; that there were no gutters or sidewalks (except a plank sidewalk for a short distance on the side opposite the defendants' works) on either side ; and that there was not very much travel over it ; that the ground where the truck was placed was hard and firm ; that the iron was some ten feet in length, one end being much heavier than the other, nearly round ; and that it projected beyond each end of the truck, the heavy end being placed on the forward part of the truck ; that the truck was four or five feet long, and so constructed that the fore-wheels could be turned around under its body and the tongue brought at right angles with the body, and that, even when the iron was upon it, very little strength was required to turn the tongue around into this position ; that when the truck was in this position it would easily tip, so as to allow the iron to roll off, especially if the heavy end projected two feet over the front part of the body of the truck, or if by any means the iron was not in the centre of the truck ; that there were no blocks, chocks or trigs under any of the wheels of the truck ; that the iron upon the truck was not blocked or triggered on either side ; and that the tongue of the truck was turned about one fourth of the way around towards the centre of the street.

" There was evidence tending to show that children were accustomed to play in that part of Marion Street immediately adjacent to the defendants' works, and that the defendants were aware of this ; but no evidence that the plaintiff had ever played there before.

" There was also evidence tending to show that the plaintiff, who was a boy seven years and three months old, and James Connors, a boy eight years old, just before the accident, which occurred about seven o'clock in the evening, were down by the water's edge, where Thomas J. Lane, the plaintiff's brother, a boy about sixteen years of age, was painting a boat ; that Thomas J. Lane told the plaintiff to go home ; that the plaintiff with Connors proceeded homewards by the most direct route, which was across Bremen and through Marion Streets, and by the

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defendants' works and said truck ; that it would not take over a minute to walk from where Thomas J. Lane was painting the boat to the truck ; and that, in about a minute from the time he directed his brother to go home, Thomas J. Lane heard an outcry, and running up to the defendants' works found the truck tipped over, the iron lying on the ground by the side of it, and his brother bleeding and in the arms of a man, who was carrying him home.

"There was also evidence tending to show that, as the plaintiff and Conners were proceeding homewards, and when nearly across Bremen Street, and just about to enter on Marion Street, Horace Lane, a boy twelve years of age, not related to the plaintiff, who was coming down Marion Street, said to them, 'Come over here and see me move this truck ;' that the plaintiff and Conners went to the side of the truck next to the defendants' works, when Conners said to the plaintiff, 'You go round on the other side ;' that the plaintiff went around on the other side, out into the street, near the truck, Conners remaining upon the inside next to the defendants' works, and Horace Lane turned the tongue of the truck around just a little towards the centre of the street, whereupon the forward end of the truck tipped, and the iron rolled off, falling upon the plaintiff's thigh ; that neither the plaintiff nor Conners touched the iron or truck at all ; that they were not at the truck more than half a minute before the injury occurred ; that Horace Lane was not with the plaintiff and Conners at the boat ; that he reached the truck before the plaintiff or Conners, coming to it from an opposite direction ; and that he did not hear Conners tell the plaintiff to go around on the other side.

"The evidence tended to show that the injury sustained by the plaintiff was of a very severe character, crippling him for life.

"After the evidence of the plaintiff and defendants was in, the counsel on each side presented me with written requests for instructions to the jury ; but I ruled that the plaintiff could not maintain his action, and ordered the jury to return a verdict for the defendants ; and I report the case for the consideration of the supreme judicial court."

*H. D. Hyde & W. G. Colburn, for the plaintiff*

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Wilton v. Middlesex Railroad Company.

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*A. A. Ranney & N. Morse*, for the defendants.

WELLS, J. 1. Whether the defendant was in fault in leaving the truck in the street, or in leaving it insecure, and whether the occurrence, by which the plaintiff received his injury, was one which might reasonably have been apprehended as the result of such negligent conduct, and was in fact a result thereof, were questions for the jury; the burden of proof being on the plaintiff.

2. If these points should be found in favor of the plaintiff, the fault of the older boy, Horace Lane, in moving the tongue of the truck, would not prevent recovery from the defendant, although it contributed to the result. It would be otherwise, of course, if the misconduct of Horace Lane should be found to be the sole, direct or culpable cause of the injury.

3. Whether the plaintiff participated in the wrongful conduct of Horace Lane was also clearly a question for the jury.

4. The remaining question, and that, as we suppose, upon which the verdict was ordered for the defendant, is, whether the plaintiff was shown to be in the exercise of due care on his part, in going to the place and standing so near the truck while Horace Lane was attempting to move it. Upon this point, we are of opinion that the evidence reported does not conclusively show negligence or fault on his part; and that the question whether he was in the exercise of proper and reasonable care should have been submitted to the jury upon all the circumstances of the case. *Mayo v. Boston & Maine Railroad*, 104 Mass. 137.

*Verdict set aside.*

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ELLEN WILTON *vs.* MIDDLESEX RAILROAD COMPANY.

If a person riding with due care on the platform of the horse-car of a street railroad corporation, not as a passenger for hire, but by invitation of the driver, and without collusion with him to defraud the corporation, is injured through his negligence in driving the car, the corporation is liable.

TORT against a street railroad corporation for personal injuries alleged to have been received by the plaintiff through the negligence of the driver of one of the defendants' horse-cars.

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At the trial in this court, the plaintiff offered to prove "that on July 16, 1868, at which time she was nine years of age, she went out about seven o'clock in the evening to walk; that she was in company with four or five other girls, on the Charlestown bridge, and near the draw, and one of the defendants' cars came along very slowly; that there were no passengers on the platform, and the driver beckoned to the girls to get on, and they accordingly got on the platform, while the car was going slowly; that the driver then struck his horses, and they started on a fast trot; that the plaintiff had one foot on the step, and by reason of the sudden start lost her balance; that she called to the driver to stop, but the car kept on, and she fell so that one of the wheels passed over her arm, and she was obliged to have it amputated; and that she used due care and the driver was careless." It was admitted that the plaintiff was not a passenger for hire, and that the driver had no authority to take the girls upon the car and carry them, unless such authority was to be implied by the fact of his employment by the defendants as a driver. Upon the plaintiff's offer of proof, the case was reserved by the chief justice for the consideration of the full court; if the plaintiff was entitled to recover thereon, the case to stand for trial; otherwise, judgment to be given for the defendants.

*E. H. Derby*, for the plaintiff.

*L. M. Child*, for the defendants.

MORTON, J. The plaintiff was injured while riding upon one of the defendants' cars. At the trial, she offered to prove that she was in the exercise of due care, and that the driver of the car was careless. For the purposes of this hearing, therefore, we are to assume that she was injured by the negligence of a servant of the defendants, in the course of his employment; and that her own want of care did not contribute to the injury. It follows, that she can maintain this action; unless we sustain the position taken by the defendants, that she was unlawfully upon the car, and therefore not entitled to recover.

The facts which the plaintiff offered to prove, bearing upon this question, are as follows: The plaintiff, a girl of nine years of age, was walking with several other girls upon the Charlestown

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bridge about seven o'clock in an evening in July. One of the defendants' cars came along very slowly, and the driver beckoned to the girls to get on. They thereupon got upon the front platform. It was admitted that the plaintiff was not a passenger for hire, and that the driver had no authority to take the girls upon the car and carry them, unless such authority is to be implied by the fact of his employment as driver.

Upon these facts, it is clear that it would be competent for the jury to find that the beckoning by the driver was intended and understood as an invitation to the plaintiff to get upon the car and ride. In accepting this invitation and getting upon the car, we think she was not a trespasser, there being no evidence of collusion between her and the driver to defraud the corporation.

A master is bound by the acts of his servant in the course of his employment. They are deemed to be the acts of the master. *Ramsden v. Boston & Albany Railroad Co.* 104 Mass. 117, and cases cited. The driver of a horse-car is an agent of the corporation, having charge, in part, of the car. If, in violation of his instructions, he permits persons to ride without pay, he is guilty of a breach of his duty as a servant. Such act is not one outside of his duties, but is an act within the general scope of his agency, for which he is responsible to his master. In the case at bar, the invitation to the plaintiff to ride was an act within the general scope of the driver's employment, and if she accepted it innocently she was not a trespasser. It is immaterial that the driver was acting contrary to his instructions.

It follows, that the plaintiff, being lawfully upon the car, though she was a passenger without hire, is entitled to recover, if she proves that she was using due care at the time of the injury and that she was injured by the negligence of the driver. *Philadelphia & Reading Railroad Co. v. Derby*, 14 How. 468, 483.

In the present aspect of the case, we are not called upon to consider to what extent the defendants might be held liable if it were shown that the plaintiff was unlawfully riding upon the car.

*Case to stand for trial.*

LYMAN R. BLAKE *vs.* EZEKIEL B. STODDARD.

At a trial, the defendant, to show that testimony of the plaintiff as to the time when he bought a promissory note was not to be relied on, put in evidence answers of the plaintiff to interrogatories filed in the case, in which he stated that he bought it at a different time. The plaintiff, on reexamination, offered to testify that he was mistaken in his answers to the interrogatories, and that, as soon as he discovered his mistake, he informed his counsel, in order that it might be corrected. *Held*, that this testimony was admissible, although the plaintiff had not asked leave to amend his answers.

CONTRACT on two promissory notes signed by the defendant, dated July 1, 1865, payable, one in twenty-six, and the other in thirty months.

At the trial in the superior court, before *Reed, J.*, it appeared that the notes had belonged to Samuel Blake and been by him transferred to the plaintiff, and that Samuel Blake had executed to the defendant in July 1867 a release under seal of all claims against him. The defendant contended that the notes were transferred by Samuel Blake to the plaintiff after the release and after maturity, and that the plaintiff took them with knowledge of the release. The plaintiff testified that he bought them in good faith from Samuel Blake about the middle of June 1867.

The defendant introduced and read to the jury the answers of the plaintiff to interrogatories filed by the defendant, in which he stated several times that he purchased the notes and they came into his possession in May 1867. The plaintiff was called in reply, and was asked when he first discovered that he had given a wrong date in his answers, and what, if anything, he did in consequence of it. To this question the defendant objected but not on account of its form; the objection was overruled; and the plaintiff answered "that, very soon after the day when the answers were made, he discovered, upon examining some memoranda as to the date of his return from Europe, that he must have purchased the notes in June and not in May, and that he immediately went to his counsel and informed him that it was not in May but in June that he bought the notes, that it might be corrected."

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

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Blake v. Stoddard.

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*J. D. Ball*, for the defendant.

*E. Merwin*, for the plaintiff.

COLT, J. To show that the testimony of the plaintiff as to the time when he bought the notes in suit was not to be relied on, the defendant produced his previous written answers to interrogatories filed under the practice act, in which he stated a different time. In reply to this, it was clearly competent for the plaintiff to explain that he was mistaken in his first answer, and took steps to correct the mistake when discovered. In answer to the question what he did in this connection, he stated, it is true, that he went to his counsel and informed him of it. His statements to others in the absence of the defendant would not be competent evidence of the facts stated, and do not appear to have been offered as such. In answer to the question here put, the fact that he went to his counsel, and the statement made, must be regarded as acts accompanying the discovery of the mistake and explaining the plaintiff's conduct in regard to it. As such, the evidence was properly admitted as against the defendant's general objection to its competency. *Commonwealth v. Hawkins*, 3 Gray, 463. It is not necessary, under our practice, to first ask the witness whether he has ever testified differently. *Gould v. Norfolk Lead Co.* 9 Cush. 338.

It is urged that the plaintiff should have first asked leave to amend his written answers, and could not, without such amendment, be allowed to explain them. But the plaintiff was called as a witness, and must have the privileges of a witness when his former declarations are used to discredit his testimony.

*Exceptions overruled.*

**CHARLES L. HANCOCK, administrator, vs. FRANKLIN INSURANCE COMPANY.**

In an action by an administrator against an insurance company, the declaration alleged that the defendants made to the plaintiff's intestate a policy of insurance against fire on a dwelling-house situated on C. Street; that in 1849, before the expiration of the policy, the house was destroyed by fire; and that the defendants had notice of the loss. The plaintiff filed interrogatories to the president of the defendants, asking him to state whether it appeared by their records that a policy against fire, which had not expired in December 1849, was issued in that year to the plaintiff's intestate on a dwelling-house on C. Street, either on lot 3 or lot 4, according to a plan of lots; and whether the plaintiff's intestate ever notified the defendants of a loss under the policy. *Held*, that the interrogatories, so far as they were relevant, must be answered.

In an action against an insurance company to recover for a loss under a policy, interrogatories filed to their president which do not inquire for official information, but as to his personal knowledge and admissions concerning the matter in suit, need not be answered.

Whether a party to a suit, who has filed interrogatories under the Gen. Sts. c. 129, § 46, can file further interrogatories on the same subject matter, is discretionary with the court.

**CONTRACT** by the administrator of the estate of John Hancock, Jr. Writ dated January 1, 1869. The first count of the declaration was for money had and received to the use of the plaintiff's intestate; and the second count was as follows: "And the plaintiff further says that the defendants made to said John Hancock, Jr., in his lifetime, a policy of insurance for the sum of \$1700, on a wooden dwelling-house, situated on Church Street in the town of Somerville, against the perils of fire, and before the expiration of said policy the said house was totally destroyed by fire, in the year 1849, and the defendants had notice of said loss and were bound by the terms of said policy to pay the amount of said loss, and the defendants owe the plaintiff therefor the sum of \$1700 and interest thereon." The answer denied all the allegations of the declaration, and set up the statute of limitations to both counts.

The plaintiff filed fifteen interrogatories to William M. Byrnes, now president, and formerly secretary of the defendants, eight of which were answered, and the remaining seven were as follows:

"*Int.* 9. State whether or not it appears by the records of the Franklin Insurance Company that a policy of insurance against loss or damage by fire, which by its terms had not expired in De-



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Hancock v. Franklin Insurance Company.

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cember 1849, was issued, during the year 1849 or thereabouts, to said John Hancock, Jr., on a dwelling-house in Church Street, Somerville, either on lot 2 or 4 according to a plan of lots? If so, annex to your answer a copy of said policy. *Int.* 10. Did the said John Hancock, Jr., ever notify the said insurance company of a loss under said policy? *Int.* 11. Do you or not know that a loss or a total loss occurred under said policy? *Int.* 12. Do you recollect ever mentioning to any person that the said insurance company owed to said John Hancock, Jr., or his estate, for the loss occurring under said policy? *Int.* 13. Do you recollect admitting, in a conversation with the plaintiff in this suit, and whilst you were an officer of said insurance company, that a loss or a total loss had occurred under said policy? *Int.* 14. Do you recollect having a conversation with the plaintiff in this suit, about a loss occurring under said policy, and about said policy in general? And if so, state when it was and what was said. *Int.* 15. If you know a loss or a total loss occurred under said policy, do you know of any reason why it was not paid?"

As to these seven interrogatories, the defendants submitted to the court "whether they should answer the same, inasmuch as the declaration does not state with sufficient certainty what house of the plaintiff's intestate is claimed by the plaintiff to have been insured by the defendants, and the interrogatories inquire generally with regard to a policy made by the defendants upon houses of the plaintiff's intestate, and are not confined to the particular house or policy set forth or referred to in the declaration, or to any particular house, and appear to be merely fishing interrogatories, in relation to matters which took place twenty years ago, and are otherwise improper and irrelevant."

The plaintiff moved that the defendants be ordered to answer them, and in support of his motion filed an affidavit "that, at or about the time of the commencement of this suit, the president of the defendants, in conversation with him, admitted that a policy had been issued by the company to his intestate on a house in Church Street in Somerville, and that a loss had occurred under the policy and had never been paid; that he has made diligent search among the papers of his intestate for the policy, but can

find none, and believes that the same has been lost or destroyed that his intestate did own a house and land on Church Street in Somerville, and the house was destroyed by fire ; and that the lot of land on which the house stood was numbered either 2 or 4, according to a plan of lands on said street." But *Chapman, C. J.*, ruled that the defendants need not answer the seven interrogatories.

The plaintiff then filed six further interrogatories, relating to the same subject matter as the first eight of the former set, all of which eight, it was admitted, had been substantially answered ; the defendants refused to answer these further interrogatories ; and on the motion of the plaintiff that they might be ordered to do so, the chief justice ruled that they need not answer them. The plaintiff alleged exceptions, which were allowed ; and the case was reserved for the full court, such judgment to be entered therein as they should direct.

*G. W. Phillips*, for the plaintiff.

*C. A. Welch*, for the defendants.

CHAPMAN, C. J. The court are of opinion that the ninth and tenth interrogatories ought to be answered. The second count sets forth a policy of insurance, describing it ; also a loss, a notice to the defendants, and a liability to pay. The answer denies the allegations, and sets up the statute of limitations. The plaintiff is not obliged to file a replication to the answer, unless he shall be ordered to do so hereafter ; but he is authorized by the Gen. Sts. c. 129, § 46, to file interrogatories, as therein provided, at this stage of the case. The ninth interrogatory is apparently too broad ; but interrogatories are not to be treated with unnecessary strictness, and so far as this interrogatory may include matters not relevant to the case as stated in the declaration, the defendant is not bound to answer it, and may confine his answer to what is relevant.

The other five interrogatories do not appear to call for any official information from Byrnes, as president or secretary of the company, and apparently inquire as to his personal knowledge of such facts as he could only state as a witness on the stand, or in a deposition. The court are of opinion that the plaintiff is not entitled to have them answered.

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Cardany v. New England Furniture Company.

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As to the six additional interrogatories, the statute gives a party the right to interrogate his adversary but once. He has no right to pursue him with fresh interrogatories as often as he may think fit. But by a liberal construction of the statute the court may allow interrogatories to be amended, and may also in their discretion permit new interrogatories to be filed. A decision of Mr. Justice Hoar, when a judge of the court of common pleas, has been generally accepted as a correct interpretation of the statute, and well expresses the opinion of the court: "A plaintiff cannot, as a matter of right, file successive sets of interrogatories to a defendant, and require answers under oath. But the court will, as a matter of discretion, allow supplemental interrogatories to be filed, and require them to be answered, where new and unexpected facts are disclosed in the answers, or where, for some reason not involving neglect on the part of the interrogator, he has failed to obtain the information sought by his interrogatory." *Fowle v. Gardner*, 14 Law Reporter, 456. The court do not think this a case in which their discretionary power to permit additional interrogatories to be filed should be exercised.

*Ninth and tenth interrogatories to be answered so far as they relate to the case stated in the declaration.*



**JOSHUA B. CARDANY vs. NEW ENGLAND FURNITURE COMPANY & trustee.**

When it is sought to charge a trustee in foreign attachment on his answer, the natural import of the language of the answer must control; he is to be charged or not, according as the evidence afforded by the whole answer preponderates; and it is for the plaintiff to prove his allegations, not for the trustee to disprove them.

A debtor assigned property to two persons for the benefit of his creditors; all the creditors signed the assignment; the assignees accepted the trust; and the property was insufficient for the payment of the debts. *Held*, that one of the assignees was not liable to be summoned as trustee in a suit by one of the creditors against the debtor.

**TRUSTEE PROCESS.** Joseph H. Bragdon, summoned as trustee of the defendants, answered, and filed answers to interrogatories

put by the plaintiff. The superior court ordered the trustee to be discharged, and the plaintiff appealed. The facts are stated in the opinion.

*T. Carleton*, for the plaintiff.

*H. N. Sheldon*, (*J. B. Goodrich* with him,) for the trustee.

COLT, J. The question of the trustee's liability in this case is to be decided wholly by the facts disclosed in his answer. Neither the plaintiff nor the defendants, in the suit in which it is sought to charge him, allege or seek to prove any fact, not stated or denied, which is material to the decision of the question. Gen. Sts. c. 142, § 11. In arriving at the facts, the plain and natural import of the language of the answer, taken together, must control, and the trustee is to be charged or not, according as the evidence afforded by the whole answer preponderates. There is no presumption in advance, that the alleged trustee has the goods, effects or credits of the principal defendant in his possession, from which he must relieve himself by his answer. It is for the plaintiff to prove his allegation, not for the trustee to disprove it. *Porter v. Stevens*, 9 Cush. 530. *Lane v. Felt*, 7 Gray, 491.

In the opinion of the court, the trustee fairly discloses in his answer, that the property, claimed to be goods, effects and credits of the principal defendants in his hands, was transferred to him and another jointly, by an assignment made in the usual form, for the benefit of the defendants' creditors, and in satisfaction of their several claims; that this instrument was executed by all who were in fact creditors, including the plaintiff, and all its conditions were performed; that they accepted the trust, and are proceeding in the settlement of it; and that the property assigned is not sufficient for the payment of the debts so secured. Upon these facts, the trustee must be discharged.

The assignment under which the trustee claims, even if liable to be avoided by proceedings in insolvency or bankruptcy, is binding upon the parties to it until so avoided, and cannot be repudiated by the plaintiff in this proceeding. *Edwards v. Mitchell*, 1 Gray, 239.

*Trustee discharged.*

## LEVI C. FISHER vs. CHARLES H. DEANS.

In support of an action for causing the plaintiff to be unlawfully imprisoned, evidence is competent that the defendant, as a trial justice, suffered the plaintiff, whom he had sentenced to pay a fine and costs, to go at large, and ten weeks afterwards, the fine and costs remaining unpaid, committed him to jail upon a mittimus, for the purpose of extorting money from him.

TORT for causing the plaintiff to be unlawfully imprisoned. At the trial in the superior court, before *Rockwell, J.*, it appeared that the defendant, as a trial justice for the county of Norfolk, issued a warrant against the plaintiff, on the complaint of David Fisher, charging the plaintiff with maliciously taking and carrying away a pine log from the land of the complainant; that on January 23, 1868, the plaintiff was tried on the complaint before the defendant, convicted, and sentenced to pay a fine and costs and stand committed until sentence should be performed; that the fine and costs were not paid; that a mittimus, bearing date of January 23, 1868, was at some time issued against the plaintiff; and that on April 1, 1868, the plaintiff was committed to jail on the mittimus, and kept confined there thirty days.

The plaintiff offered evidence tending to show that the conduct of the defendant, in issuing the warrant and convicting and sentencing him, was prompted by malice; but the judge excluded it.

There was evidence that immediately after the trial the defendant told the plaintiff that he could maintain a bill in equity for the land from which he was accused of having taken the log; that the defendant drew an agreement to submit the differences between David Fisher and the plaintiff to arbitration, and induced the plaintiff to appoint a certain person as one of the three arbitrators; that, at the time the arbitrators met, the defendant desired the plaintiff "to leave open \$50 of the amount awarded;" that on February 5, 1868, the arbitrators awarded that David Fisher should pay \$550 to the plaintiff; that afterwards the defendant asked the plaintiff to pay him \$25, which the plaintiff refused to do; that again, four or five days before the plaintiff's

arrest, the defendant demanded \$25 from him, and said that he would make him trouble if he did not pay; that the plaintiff remained at home from January 23 till April 1; that the sentence was not performed before the plaintiff's imprisonment; and that the defendant refused to furnish copies of the record of the plaintiff's conviction until paid \$15 for services alleged to be due from the plaintiff in reference to the arbitration.

The judge ruled that there was no evidence which would entitle the plaintiff to recover, and directed a verdict for the defendant. The plaintiff alleged exceptions.

*J. W. Pettengill*, for the plaintiff.

*J. B. Goodrich & H. N. Sheldon*, (*H. J. Edwards* with them,) for the defendant.

AMES, J. No authority need be cited for the position that a justice of the peace, while acting in his judicial capacity, and within the limits of his lawful jurisdiction, is exempt from all responsibility in a private action, as a wrongdoer, for any official order or judgment, even though it may be erroneous and malicious. But this exemption does not extend to any illegal act which he may have done in the exercise of his ministerial powers and duties. When in the progress of a civil action, or a criminal proceeding, a final judgment has been rendered, his judicial duty is at an end, and nothing remains but to carry the judgment into effect. The issue of the execution, or other warrant for that purpose, is a ministerial and not a judicial act, and he may be held responsible in a civil action for any illegal act of that description. *Briggs v. Wardwell*, 10 Mass. 356. *Doggett v. Cook*, 11 Cush. 262. The plaintiff must therefore be considered as having no legal cause of action on the ground that he was wrongfully convicted and sentenced.

But in this case the plaintiff offered evidence tending to show that, immediately after his trial and conviction upon the complaint, a negotiation for a settlement of the controversy between himself and the complainant was entered into, with the knowledge and concurrence of this defendant. The result of this negotiation was a submission of the matter to the arbitration of three men mutually agreed upon, who heard the parties, and made and

published an award. These proceedings occupied a considerable length of time, and the evidence tended to show that the defendant not only had knowledge of them, but took part in them, or rather superintended and directed them from the beginning. The jury might well have inferred, upon the evidence, that the defendant, the magistrate, voluntarily suffered the plaintiff to go out of custody, and by his order or consent permitted him to go at large. In such a state of facts, the case would be almost exactly similar to *Doggett v. Cook*, above cited, in which it was ruled that the issue of a mittimus by the magistrate, upon the sentence, in such circumstances, without the issue of some new process to bring the prisoner before him, was an unauthorized proceeding, and would render the magistrate liable as a trespasser. It is true that, in that case, the interval between the sentence and the commitment under it was nearly a year, but the ground of the decision was the fact that the party convicted was permitted to go at large, and no order for his committal was then made. The court say in that case, "A preliminary step, the issuing of a *capias* to bring the party before the justice, to show cause why he should not be committed in execution of the sentence, would seem to be required at least, before issuing a mittimus at that remote period from the time of passing sentence. The party should, at that late day, have had the opportunity to show cause why he should not be committed to jail for not paying the fine and costs he had been adjudged to pay." In that case, the delay on the part of the magistrate was owing to the fact that an appeal from his judgment had been claimed and entered, which was afterwards dismissed by the appellate court; but we do not understand the decision, as given by Dewey, J., to turn upon the length of the delay, or to intimate that the case would have stood in a different position if the interval between the sentence and the commitment had been a period of ten weeks, as in this instance, instead of nearly a year. The irregularity consisted in permitting the party convicted to go at large, and afterwards arresting and committing him to prison "on the common mittimus, such an one as would have been appropriate on the day of the conviction, if he had failed to pay the fine and costs."

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Bolduc v. Randall.

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In this case, the plaintiff offered to prove that the warrant upon which he was committed to prison was not issued until the first day of April, which was about ten weeks after he was convicted, and that this unauthorized proceeding was not the result of a mere mistake. On the contrary, the evidence on his part tended to prove, and if not contradicted or explained was sufficient to prove, that the warrant was issued for a corrupt and dishonest purpose, namely, to extort money from him, and under a threat to make trouble for him if he did not pay the money demanded. We think that all this evidence was competent, and proper to be laid before the jury. The official irresponsibility of this defendant, in a civil action, for errors or misconduct in the exercise of his judicial functions, does not protect him in unauthorized or illegal ministerial acts, done with corrupt motives or for dishonest purposes. The case was therefore improperly withdrawn from the jury, and the

*Exceptions are sustained.*

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MARGARET BOLDUC vs. JOHN N. RANDALL.

An action cannot be maintained for the price of intoxicating liquors sold in the county of Suffolk without a license, while the St. of 1868, c. 141, was in force, although the seller, before the sale, petitioned for a license, and after the sale a license was granted to him, and at the time of the sale there were no commissioners who could grant licenses.

**WRIT OF REVIEW.** The original action, in which the plaintiff in review was defaulted, was brought against her for the price of intoxicating liquors sold to her by the defendant in June 1868. Trial in the superior court, before *Pitman, J.*, and verdict for the plaintiff in review. The defendant in review alleged exceptions. The case is stated in the opinion.

*I. H. Wright*, for the defendant in review.

*W. S. Knox*, for the plaintiff in review.

**COLT, J.** The sales of liquor, for the price of which the original action was brought, were expressly forbidden by the statutes of this Commonwealth, unless made by one duly licensed by the commissioners of the county of Suffolk. St. of 1868, c. 141.



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Furber v. Dearborn.

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The plaintiff in review proved that the seller was not licensed in fact till some time after the sales were made ; and there was no contest about the fact. The contract was therefore illegal, and cannot be enforced.

It is no answer to this, that a petition for a license had been filed by the defendant in review with the city authorities before the first sale was made. The license takes effect from its date. It cannot protect sales previously made. Nor does the fact that at the time of these sales no commissioners had been elected for the county of Suffolk render these sales valid. It is the seller's misfortune that he could not comply with the only condition by which the sales could be made legally. By the provisions of the statute, all licenses are required to bear date of the day when issued, and expire on the first day of May. And although the seller in this instance paid the fee which is in all cases required, yet we cannot from this construe the statute as intending to legalize the sales of the whole year, without regard to the time when the license is issued. It must take effect from its date.

*Exceptions overruled.*

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EDWIN P. FURBER vs. JOHN B. DEARBORN.

A mortgagee of goods who has been summoned as trustee on a writ against the mortgagor under the Gen. Sta. c. 123, §§ 67-71, cannot replevy them from the attaching officer during the continuance of the attachment.

REPLEVIN of household furniture. Writ dated and served March 11, 1870. At the trial in the superior court, before Lord, J., it appeared that the replevied goods belonged to Manly B. Witherell, and were by him mortgaged to the plaintiff, and afterwards attached by the defendant, who was a deputy of the sheriff of Suffolk, on two writs against Witherell, in which the plaintiff was summoned as trustee. It did not appear that any written demand was made upon this defendant before the commencement of the replevin suit. The two writs were duly returned at April term 1870 of the superior court.

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Adams v. Wildes.

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The defendant contended that the action could not be maintained, because no written demand had been made upon him, and because the goods, being in the custody of the law, could not be replevied by the plaintiff. The judge ruled that the action could not be maintained, and ordered a verdict for the defendant. The plaintiff alleged exceptions.

*A. R. Brown*, (*E. A. Alger* with him,) for the plaintiff.

*J. D. Thomson*, for the defendant, was not called upon.

MORTON, J. The plaintiff claims title to the replevied goods as mortgagee. The defendant, a deputy sheriff, attached them upon two writs in favor of creditors of the mortgagor in which the mortgagee was summoned as his trustee, under the provisions of the Gen. Sts. c. 123, §§ 67-71. The attaching creditors thus acquired the right to try the validity of the plaintiff's mortgage, either by examining him under oath or by a trial by jury at their election, and this right is inconsistent with and excludes the right of the mortgagee to replevy the attached goods. Until the attachment is dissolved, either by a voluntary abandonment or by a neglect to pay the sum found due on the mortgage within the time prescribed by the court, the custody by the officer is lawful, and the mortgagee has no right of possession which will enable him to maintain replevin. *Boynton v. Warren*, 99 Mass. 172. *Martin v. Bayley*, 1 Allen, 381. *Hayward v. George*, 13 Allen, 66.

*Exceptions overruled.*

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GEORGE H. ADAMS, administrator, vs. ASAHEL H. WILDES.

J. S. mortgaged a chattel, in his possession but belonging to another, to the plaintiff, and afterwards sold it to the defendant; and the owner never claimed it. *Held*, that on foreclosure of the mortgage the plaintiff could replevy it from the defendant.

If a mortgagor of goods mixes them, purposely or carelessly, with his own, and sells the whole, the mortgagee can replevy the whole from the purchaser, in the absence of evidence to distinguish the mortgaged goods from those not mortgaged.

To replevin by a mortgagee of goods against the mortgagor it is no defence that the goods are subject to a prior mortgage, if the prior mortgage provides that the mortgagor may remain in possession until breach of condition, and there is no evidence that the prior mortgagee has made any claim upon the mortgagor.

REPLEVIN of ironworker's machinery, tools and materials, brought by the administrator of the estate of George Adams. The answer alleged property in the defendant. Writ dated November 15, 1867.

Trial in the superior court, without a jury, before *Rockwell, J.*, who found as facts, that Calvin Gay on November 13, 1866, by two mortgages, duly recorded, mortgaged the greater part of the property replevied and also other like property to George Adams; that Gay, without the consent of George Adams, used up or sold part of the mortgaged property, generally replenishing the stock when thus diminished; that in the spring of 1867 he sold all the replevied property to the defendant, who removed it to a loft in his possession; and that the mortgage was foreclosed September 1, 1867.

"There was no evidence to show what specific articles had been used up or sold by Gay, previously to the sale to the defendant; or which, if any, of the articles replevied had been purchased by Gay by way of replenishing the stock; but the evidence left those facts in this way, namely, that the larger part of the articles found in the defendant's loft were identical articles included in the mortgage, but some had been sold by Gay, and perhaps some of the minor articles found in the loft had been purchased by way of replenishing the stock, but there was no evidence of any specific articles having been thus purchased."

It appeared that a rotary pump which was included in the mortgages, and was replevied, was the property of a third person at the date of the mortgages, but has never been claimed by him.

Before the mortgages to George Adams, Gay had mortgaged the same property to John C. Dodge by a mortgage which provided that the mortgagor might remain in possession until breach of the condition of the mortgage; and there was no evidence "that anything had been claimed or done under that mortgage."

On these facts the judge found for the plaintiff, and reported the case to this court for revision.

*S. B. Ives, Jr.,* & *R. Lund*, for the defendant, cited *Presgrave v. Saunders*, 1 Salk. 5; *Molineux v. Coburn*, 6 Gray, 124; *Johnson v. Neale*, 6 Allen, 227; *Ropes v. Lane*, 9 Allen, 502; *Rock-*

*well v. Saunders*, 19 Barb. 473; *Seibert v. McHenry*, 6 Watts, 801; *Bemus v. Beekman*, 3 Wend. 667; *Chase v. Allen*, 5 Allen, 599; *Collins v. Evans*, 15 Pick. 63; *Rugg v. Barnes*, 2 Cush. 591; *Hallett v. Fowler*, 10 Allen, 36; *Bartlett v. Brickett*, 9f Mass. 521.

*T. Willey & D. F. Fitz*, for the plaintiff.

COLT, J. The case was submitted to the court without a jury, and the judge submits the question whether the facts reported do in law justify his finding that the plaintiff was entitled to recover.

1. It is objected that the rotary pump was proved to have been, at the time it was mortgaged, the property of a third party, and that the defendant was therefore entitled to a judgment for its return. But under the circumstances here stated, this proof was not alone sufficient to support this claim. The pump was in the possession of Gay at the time it was mortgaged to the plaintiff's intestate, he had the apparent ownership, and there was an implied warranty of title. Gay himself would not be allowed to defeat the title by setting up ownership in another; and the defendant, who takes from him subject to these mortgages, and takes by no other title, and in his answer sets up title in no one else, must stand in his position in this respect, and cannot now set up the title of a third party under which he does not pretend to claim, and under which the property never has been claimed of him or any one else. As against the defendant, under such a title there was both property and the right to immediate possession in the plaintiff.

2. The case, as we understand the report, justified a finding by the court, either that the property replevied embraced only that described in the mortgages to the plaintiff's intestate, or that the disputed portion, consisting of that which was purchased by Gay to replenish his stock, was so purposely or carelessly mingled by him with the other mortgaged goods as not to be distinguishable. It was the duty of the defendant, as he only succeeded to Gay's title subject to the mortgages, to identify the specific articles which were not embraced in them. This the case finds he failed to do. *Willard v. Rice*, 11 Met. 493.

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Gilson v. Gwinn.

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8. The prior mortgage to Dodge, so long as no claim was made under it upon the defendant, and no actual possession of the property taken, cannot be used to defeat the plaintiff's right of property and possession. As against the defendant his title was good, and it was good against everybody except Dodge and his assigns. By the express terms of that mortgage, Gay was entitled to the possession of the property until breach of condition, and he was rightfully in possession, with the right to convey his equity of redemption in the goods, when the conveyances were made to the plaintiff's intestate.

*Judgment for the plaintiff.*

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ALONZO P. GILSON vs. JAMES E. GWINN.

One who carries a chattel at the sole request and for the sole convenience of a bailee thereof has no lien thereon for his services, as against the owner.

TORT for the conversion of a sewing machine. At the trial in the superior court, before *Reed, J.*, the plaintiff introduced evidence tending to show that, being the owner of the machine, he let it to Betsey Bunton for a dollar a week, payable in advance; that she paid for some weeks, but afterwards stopped payment; that some time after she stopped payment she moved from Springfield Street in Boston, where she had been living, to Myrtle Street, and employed the defendant, who was licensed to remove furniture from place to place in Boston, to remove her furniture, including the machine, to Myrtle Street; that she neglected to pay the defendant, who thereupon retained the machine, claiming a lien thereon for his services; that the plaintiff, having subsequently gone to Springfield Street and ascertained that the lessee had moved to Myrtle Street, called on her there and learned that the defendant had the machine; and that he then saw the defendant, and desired him to accept a deposit of other goods of the lessee in place of the machine, but the defendant refused, and he then demanded the machine.

The defendant offered no evidence, and the judge ruled that he had no lien. The jury returned a verdict for the plaintiff.

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Merrimack Manufacturing Company v. Quintard.

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and the judge reported the case for the consideration of this court; if the ruling was correct, the verdict to stand; if on the facts reported the defendant had a lien on the machine, then judgment to be for the defendant.

*C. H. Hudson*, for the defendant.

*J. F. Wilson*, for the plaintiff, was stopped by the court.

WELLS, J. The lessee of the sewing machine had a right of possession until demand of return by the owner; but she had no right of property which she could transfer, and no authority by which she could confer any right of property upon another. She could not, therefore, give the defendant a lien upon the property for its carriage for her convenience and at her request alone.

The defendant not having a lien upon the property as against the owner, his possession became wrongful when he refused to surrender it to the plaintiff on demand therefor.

*Judgment on the verdict for the plaintiff.*

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MERRIMACK MANUFACTURING COMPANY vs. EDWARD A. QUINTARD & others.

In an action to recover damages for failure to deliver seasonably goods sold by the defendants to the plaintiffs, it appeared that, when the time agreed upon for the delivery of the goods was so nearly expired that it was evident that they could not be delivered within it, the defendants asked the plaintiffs whether they would receive the goods afterwards, and the plaintiffs replied that they not only would consent to, but insisted upon, the delivery. The plaintiffs introduced evidence tending to show that they then said that they would claim damages for any increase in the cost of the goods, produced by any advance in freights or insurance. The defendants introduced evidence tending to contradict this, and to show that the plaintiffs waived any objection on the ground of the delay. The judge instructed the jury that receiving the goods without objection on the ground of delay would be *prima facie* a waiver of any such objection, but that if, on consenting to receive the goods, the plaintiffs gave notice that they should claim damages for increased expenses growing out of the delay, then receiving the goods would not be evidence of a waiver. The jury found for the plaintiffs. *Held*, that the question of waiver was properly left to them.

The defendants contracted to sell and deliver a large quantity of coal to the plaintiffs at a fixed price, in equal monthly portions, during a certain time, to be transported, by vessel and rail, at the plaintiffs' expense, to their factory; and the plaintiffs agreed to receive the coal if the first cargo should prove satisfactory. *Held*, in an action to recover for a

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breach of the contract in delivering coal of an inferior quality, and in failing to deliver it until after the contract time, that the measure of damages for the inferior quality was the difference between the value at the factory of the coal called for by the contract and that of the coal delivered, and the measure of damages for the failure to deliver in time was not the difference in the market value, but the difference between the actual charge for freight and insurance and the average rates during the time covered by the contract, especially in the absence of evidence that the average rates were higher than the rates at the end of the contract period.

In an action to recover damages for delay in delivering coal under a contract to sell and deliver coal during the summer, freight to be paid by the purchaser, evidence is admissible that freights on coal were usually higher in the autumn than in the summer, to show what was in the contemplation of the parties, and that the loss occasioned by increase in the freight is properly to be recovered as damages.

CONTRACT to recover damages for breach of an agreement, dated February 29, 1870, between the defendants, as parties of the first part, and the plaintiffs, as parties of the second part, the provisions of which were as follows :

“ The parties of the first part agree to sell the parties of the second part 14,000 tons of the Preston & Gilberton Locust Mountain coal, deliverable from April 1 to September 1, current year, on board vessels at Philadelphia, in equal monthly proportions, as nearly as may be, at the price of \$3.50 per ton of 2240 pounds, free on board, payable in cash. If the parties of the first part be interrupted in the delivery of the above coal during the time specified, viz : April 1 and September 1, current year, by strikes or any unforeseen causes, additional time will be allowed them to complete the delivery of the same, not exceeding one month. Bills of lading shall be *prima facie* proof of delivery in regard to time and quality, and the coal when on board is to be at the risk of the parties of the second part. The parties of the first part agree to use their best exertions in procuring vessels at as low rates of freight as possible for the parties of the second part, and are to attend to the shipping of the coal without charge. Bills of lading are to be made to the treasurer of the parties of the second part, either to the Boston & Lowell Railroad Wharf in Boston, or to Phillips Wharf in Salem, so as to be conveniently delivered to the cars at either place, as customary, as the parties of the second part may direct. The parties of the second part agree to purchase and to receive the above coal as above described and specified, and to pay for the same as mentioned

above, provided the first cargo, which shall be shipped by the parties of the first part as early as navigation will permit, as a sample cargo of the coal, shall prove satisfactory to the parties of the second part; a reasonable time to be allowed for testing the same; if not satisfactory, then this agreement to be void."

The breach alleged was, that a portion of the coal delivered was inferior to the alleged sample, and that another portion was not delivered at the specified time.

At the trial in this court, before *Ames, J.*, the execution of the agreement was admitted, and it appeared "that the sample cargo was received by the plaintiffs," who are a manufacturing corporation, "at Lowell, in April 1868, and that seven or eight cargoes in about a month afterwards were landed at Boston and Salem and forwarded to the plaintiffs' works at Lowell." And there was evidence tending to show "that the quality of the coal making up these cargoes proved on trial at the plaintiffs' works at Lowell to be inferior to the sample; that they objected to it, and notified the defendants that no more of that kind would be received; and that the delivery at Philadelphia of a large portion of the coal did not take place till after October 1, whereby the plaintiffs were obliged to pay higher prices for freights and insurance." There was conflicting evidence upon the question "whether the plaintiffs agreed to waive all objection to the quality of the coal so complained of, provided the remainder should be such as the contract required, or whether that matter was merely reserved for adjustment on final settlement."

"In order to show what increase there had been in freights and insurance, resulting from the delay in delivery, the plaintiffs were permitted to show what had been the actual expense to them, under these heads, upon the coal shipped within the period limited by the contract, and what had been the actual expense for the same items on the coal shipped after that time; also to show the number of tons received within the period limited by the contract, and the average rate of freight on each ton, and the same things as to that portion of the coal that was shipped after that period; and also the increase in the cost of insurance. The



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treasurer of the plaintiffs, who testified that he had been long in the practice of buying and receiving coal from Philadelphia, was permitted to testify that freights on such shipments were usually higher in the autumn than in the summer months. To all this evidence the defendants objected as inadmissible; but the judge admitted it.

“ It appeared that, from a strike of miners or some other cause, the price of coal advanced in Philadelphia from \$3.50 per ton in July to \$5.00 in October and November, when the last coal was delivered; and that freights were usually, but not always, higher in the autumn than in the summer months; that the plaintiffs paid the freights from Philadelphia on all the cargoes which they received; that they made no complaint of delay upon any shipment previous to October 1; and that they had no opportunity to test the quality of the coal, until they began to use it in their works at Lowell; and it did not appear that the freights in the latter part of September were lower than the average rate during the three months from July 1.

“ The defendants offered evidence tending to show that, shortly before the expiration of the time limited by the contract, and when it had become manifest that the coal could not all be delivered within that time, their agent applied to the plaintiffs' treasurer to inquire whether they would receive after the time limited by the contract what remained to be delivered; and the answer was, that they not only would consent to, but insisted upon, its delivery. The plaintiffs offered evidence tending to show that the treasurer said at the same time that the plaintiffs would claim damages for any increase in the cost of the coal at Lowell produced by any advance in freights and insurance. The defendants denied that any such notice was given to their agent, or any such claim made; and they introduced evidence tending to show that all objection on the part of the plaintiffs on the ground of the delay was waived, if the defendants would agree to pay the increased expense of insurance, which they did agree to do.

“ There was also evidence that the coal objected to as bad in quality arrived at Lowell at different dates, but early in May and that the defendants were notified that it was not satisfactory.

late in that month, and sent one of their firm to Lowell to examine it; but whether there was any neglect or delay in giving notice of the objection within a proper time was one of the questions of fact submitted to the jury under instructions to which no exception was taken.

“ The defendants asked the judge to rule that, if the plaintiffs had any claim on the ground of delay in the delivery, their damages were to be estimated by the difference in the market value of the coal between the time embraced in the contract and the time of the actual delivery; and they objected to all evidence of increased rates of freight and insurance, on that ground. They also asked the judge to rule that, by demanding the delivery of the coal after the expiration of the contract period, and then accepting it, the plaintiffs had waived the element of time in the contract; and insisted that, if the plaintiffs could recover for difference in freight and insurance, it would be only for the excess paid above the rates paid for shipments made at the termination of the contract period, and not above the average rates of that period; and that, if they had any claim for deficiency in quality, it must be for difference in value at the place of delivery, and not at Lowell, the place of consumption.”

The judge did not rule as requested, but instructed the jury “ that, if the plaintiffs received the coal at Lowell without any complaint or objection on account of its bad quality or the delay in delivery, it would be *prima facie* evidence of a waiver of all objection on either of these grounds; but if, on trial of it at their works, and within a reasonable time thereafter, they gave notice to the defendants that damages or allowance would be claimed on account of its bad quality, such receiving of the coal would not be evidence of a waiver of that objection; that if, on consenting to receive that portion of the coal which was delivered after the expiration of the contract period, they gave notice that they should claim damages for increased expenses growing out of such delay, receiving it under such circumstances would not be evidence of a waiver of that objection; that, if the delay in the delivery of the coal increased its cost to the plaintiffs, by increasing the charges for freight and insurance above the average

rate for those items or shipments during the contract period, they would be entitled in this action to recover such actual increase of the cost, unless some waiver or modification of the agreement in that respect should be shown; and that, if the plaintiffs proved that any portion of the coal delivered was inferior in quality to what they were entitled to receive, they were entitled to recover an allowance for such deficiency in value, or for the difference between the value of the coal delivered at Lowell and that of the coal which by the contract they were entitled to receive, unless some waiver of objection for that cause were shown, without reference to the value at the place of shipment."

The jury returned a verdict for the plaintiffs, and the defendants alleged exceptions.

*B. R. Curtis & B. Dean, (T. Dean with them,)* for the defendants.

*J. G. Abbott, (S. A. B. Abbott with him,)* for the plaintiffs.

COLT, J. The plaintiffs claim damages both on account of the inferior quality of the coal delivered, and the failure to deliver within the time named in the contract. The defendants insist that both claims were waived. As to the first, there was evidence that the quality of the coal was objected to within a reasonable time after its receipt. And as to the second, there was evidence of an oral arrangement for delivery after the expiration of the time named in the contract, upon which the judge was asked to rule as matter of law. But the arrangement was a matter upon which the evidence was conflicting, and tended on the one side to show an unconditional consent of the plaintiffs to extend the time, and on the other that the subsequent delivery, consented to or insisted on, was to be subject to the claim for any increased cost occasioned by advances in freights or insurance. Whether there was an intentional and unconditional surrender of the right to have the coal delivered according to the terms of the contract, both as respects time and quality, was in the province of the jury to decide, and the question was left to them with appropriate instructions. *Fox v. Harding*, 7 Cush. 516, 520.

As to the rule of damages, the plaintiffs are entitled to recover for such losses as were the direct and natural consequence of the

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defendants' failure to perform, and also for such as were foreseen, or may reasonably be supposed to have been foreseen, at the time of making the contract. To ascertain what these were, resort must be had to the terms of the contract for its meaning, as applied to the subject matter, and as interpreted by the general and known usages of the business to which it refers. It was in substance an agreement to deliver on board vessels at Philadelphia, to the plaintiffs, who are a manufacturing company at Lowell, at a fixed price, a large quantity of coal, in equal monthly proportions, during the time included in the contract. A sample was to be sent and tested by the plaintiffs, and bills of lading made to wharves either in Salem or Boston, at the plaintiffs' option, so as to be conveniently delivered to the cars in either place, as customary, and without doubt contemplating its further transportation by rail to the plaintiffs' place of business. It was therefore not simply the sale of property to be delivered at a particular time and place, but it was an agreement for the delivery of property to be transported by vessels and by railroad, at the plaintiffs' expense, to their place of business in Lowell.

This construction of the contract fully sustains the rule of damages laid down at the trial. The loss from inferior quality, to which the plaintiffs are entitled, is the loss which they sustained at Lowell. There is nothing in the case to show that they were bound, or that it was expected they would be bound, by any prior acceptance of it, at the place of shipment or elsewhere; and so the loss by the increased charges for freight and insurance is a fair measure of damage to them, ascertained by the failure to deliver in time. Nor do we perceive that any wrong is done by taking the increased rates of freight and insurance above the average rates during the contract period, especially as it does not appear that the average rates for shipment were higher than the rates paid at the termination of the contract period. These items of damage are fairly contemplated by the contract.

The difference in market value of the coal between the time of actual delivery, and the time it should have been delivered, as a rule of damages, is not applicable. The plaintiffs received all the coal called for by the contract, at the contract price, and do

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not claim damages for any deficiency in quantity. They are entitled to the benefit of their contract, although the market value had increased by the delay.

The objections taken to the admissibility of the plaintiffs' evidence appear by this discussion to have been properly overruled. It was clearly competent for the treasurer to testify that he had long been in the practice of buying and receiving coal from Philadelphia, and that freights were usually higher in autumn than in summer. The understanding of the parties must be ascertained by the nature of the traffic to which the contract refers. *Cutting v. Grand Trunk Railway Co.* 13 Allen, 381. *Batchelder v. Sturgis*, 3 Cush. 201, 204. *Bartlett v. Blanchard*, 13 Gray, 429. *Exceptions overruled.*

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### HOWARD SNELLING vs. FRANKLIN A. HALL & others.

In an action for breach of a written contract made in Boston by the defendants, who were coal commission merchants there and in Philadelphia, with the plaintiff, who was a coal dealer in Boston, to sell him a large quantity of coal, to be delivered free on board vessels at Port Richmond in Philadelphia, at a fixed price, and to be shipped at the plaintiff's option between the date of the contract and September 1, it appeared that on August 24 the plaintiff wrote to the defendants that he was ready to have the whole amount of coal delivered, but gave no direction where to ship it to, and it also appeared that colliers were continually plying between Port Richmond and Boston. *Held*, that the plaintiff's option was well exercised by his letter of August 24; that the defendants were bound to furnish the vessels, and ship the coal thereon for Boston, although it was impossible to ship it before September 1; and that evidence of a usage at Port Richmond, to interpret similar contracts as requiring the option to be given in such season as to allow the coal to be shipped between the dates named in the contract, was inadmissible.

CONTRACT by the plaintiff, doing business under the name of Howard Snelling & Company, against the defendants, doing business under the name of Hall, Caldwell & Company, for breach of an agreement of two parts, of which the first, signed by the plaintiff, was as follows: "Boston, June 11, 1868. Bought of Hall, Caldwell & Company two thousand tons Freek's Centralia broken coal, to be delivered free on board vessels at Port Richmond, Philadelphia, at three dollars and thirty-five cents per ton. Subject to changes of tolls on Reading Railroad. Hall,

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Caldwell & Company guarantee that the advances shall not exceed twenty-five cents a ton. To be shipped at our option between this date and September 1, 1868;" and the second of which, signed by the defendants, was as follows: "Boston June 11, 1868. Sold to Howard Snelling & Company, two thousand tons Freek's Centralia broken coal, to be delivered free on board vessels at Port Richmond, Philadelphia, at three dollars and thirty-five cents per ton. Subject to changes of tolls on Reading Railroad. Hall, Caldwell & Company guarantee that the advances shall not exceed twenty-five cents a ton. To be shipped at Howard Snelling & Company's option, between this date and September 1, 1868."

At the trial in the superior court, before *Rockwell, J.*, it appeared that the plaintiff was, and for some years had been, engaged in the coal business in Boston; that the defendants were coal commission merchants, doing business in Boston, New York and Philadelphia; and that the mine of Freek's Centralia coal was situated on the Reading Railroad, a long way from Port Richmond, which was the terminus of the railroad and the place for shipment of coal on board vessels in the river at Philadelphia.

The plaintiff introduced evidence that on August 24, 1868, he had some conversation with John Hall, the defendants' clerk, about the shipment of the coal, and immediately afterwards, on the same day, wrote a letter to the defendants, of which the following is all but the formal parts: "In conversation with Mr. John Hall, this morning, the writer was led to suppose that you desired of us written instructions as to the shipment of the 2000 ons Centralia broken coal purchased of you June 11. We are ready to have the whole amount delivered at any time, and have been for six weeks or more, as we have told you verbally." There was evidence that it would have been impossible to have shipped the coal between the delivery of the letter to the defendants and September 1, 1868, and that the shipment would reasonably have required the time from the delivery of the letter up to the 12th or 15th of September 1868. And it appeared that the plaintiff never had vessels ready at Port Richmond to receive any of the coal; that he never gave the defendants any directions where to

ship the coal, or any other instructions or directions in regard to the shipment, except what was contained in his letter of August 24 ; and that the letter was the only expression of the option relied upon by him at the trial.

The defendants offered evidence tending to show "that it has always been the uniform interpretation, usage and custom of the coal trade over the Reading Railroad, and at Port Richmond, that, under contracts similar to this, the option must be given, and the coal all shipped, within the time named in the contract ;" but the judge excluded this evidence.

The defendants also offered evidence tending to show that there was no tender of any vessel or vessels by the plaintiff to them to bring the coal. The plaintiff objected, upon the ground that the contract did not require the plaintiff to tender vessels, and that in the course of the coasting trade vessels were always to be found, with no great delay, at Port Richmond, seeking for freights, and ready there to meet the wants of the defendants in fulfilment of their contract. The defendants contended that the contract did not oblige them to put the coal on board vessels bound to any particular place ; and that the option could not be effectually expressed, except by tendering vessels, or designating the destination of the vessels to be loaded. The judge ruled, "that, as it had appeared in evidence, among other things, that the plaintiff was a coal dealer in Boston, that the defendants had a house in Boston, with which this contract was made, as well as one in Philadelphia, where it was to be executed, and that coasting vessels were continually plying between Port Richmond and Boston, the obligation of the defendants, after the expression of the option, was to deliver the coal, within a reasonable time, on board vessels ready and willing to proceed with their cargoes to Boston, if such vessels were at Port Richmond."

The defendants requested the judge to instruct the jury "that the true construction of the contract obliged the plaintiff to receive the coal on board vessels at Port Richmond between the date of the contract and September 1, 1868, to have vessels there ready so to receive it, and to notify the defendants thereof in such season that, acting as men diligent and skilled in the busi-

ness, and using all reasonable means, they could have made the delivery on board of such vessels before September 1, 1868; that if the plaintiff failed to perform his part of the contract in not having vessels ready at Port Richmond to receive the coal, or in not notifying the defendants thereof before September 1, 1868, the defendants would thereby be excused from shipping the coal at all;" "that, at all events, the defendants would not be bound to furnish vessels at Port Richmond to receive the coal, in the absence of directions from the plaintiff to them, on what terms and for what destination to furnish them, and on what terms and to what place the charter should be made; that it was the intention of the parties, as gathered from the language of the contract, that the plaintiff should so far perform his part of the contract, that the defendants, using all reasonable exertions and diligence, could perform their part of the contract between its date and September 1, 1868; that, if the plaintiff failed to do so, he could not maintain this action; and that the guaranty as to advance in tolls did not cover a period beyond August 31, 1868." But the judge refused so to rule, and instructed the jury "that if they were satisfied that on August 24 the plaintiff's option was made and expressed to the defendants, and such was the intention of the letter of that date, that letter was a sufficient expression of the option in form; that, upon its receipt, the obligation was placed upon the defendants to deliver the two thousand tons on vessels at Port Richmond within a reasonable time after August 24; that this obligation did not depend upon the fact whether or not the time between August 24 and September 1 was a reasonable time for said delivery, but would continue beyond September 1 if the intermediate time was not a reasonable time; that, under the terms of the contract, the plaintiff was bound to express his option before September 1, 1868, but not in such a time before that date that the coal could be shipped before that date; that he might give his option at any time between the dates mentioned in the contract; that he was not bound to tender or furnish any vessels to receive the coal; that it was the duty of the defendants, under the contract, after the expression of the plaintiff's option in his letter of August 24, to furnish the vessels at Port Richmond, charter them, and de-



liver the coal thereon ; and that, in the absence of any directions from the plaintiff as to where the coal should be shipped, as it was well known to them that the plaintiff lived and did business in Boston, and the defendants had a house in Boston, they were bound, under the contract, to ship the coal for that destination."

The jury returned a verdict for the plaintiff, and the defendants alleged exceptions.

*D. S. Richardson & F. W. Kittredge*, for the defendants.

*T. H. Sweetser & L. M. Child*, for the plaintiff.

AMES, J. It appears to us that the defendants were bound, by their contract, not merely to sell the coal to the plaintiff at the agreed price and to transport it to Port Richmond at their own expense, but also to deposit it on board a vessel or vessels, in order to be thence conveyed at the plaintiff's risk and expense to Boston. It was an executory contract, looking to a future time for the delivery of the goods bought and the payment of the agreed price, and that future time was to be determined by the plaintiff at any point of time between the date of the contract and the first day of the following September. Under such a contract, the defendants were under no obligation to deliver till the plaintiff had notified them that he was ready to receive ; and when they were so notified, it became their duty to deliver the coal on board ship at Port Richmond. To do this, they of course would be allowed a reasonable time ; and the case finds that this operation would require a period of about three weeks. We think also that the contract imports that they were to ship the coal to the plaintiff ; and that the true meaning of that stipulation is, that they were to find a vessel for that purpose, to deposit the coal on board of her, and to notify him of their doings by forwarding the customary bills of lading, or such other information as might be necessary or reasonable. The case finds that in regular course of business vessels were continually plying between Port Richmond and Boston ; and we must infer that the transportation of coal was an established and regular part of the business of such vessels. It would under the circumstances be as unreasonable to require that the plaintiff should have a vessel waiting to receive his coal whenever the defendants should be ready to deliver it at the port of delivery, as it would be to re-

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quire that the defendants should have the coal waiting and stored at that port until such time as the plaintiff should be ready to receive it on board a vessel. There is nothing in the contract that implies that the plaintiff was to select or designate a vessel, or that he had any right in that matter, except that the coal should be sent to him at his own expense and risk, by sea, according to the usual course of business, that is to say, by one or more of the numerous coasting vessels that were continually plying between Port Richmond and Boston. The defendants, by sending it in that manner, would have fulfilled their contract. The instructions of the presiding judge upon this point must therefore be considered appropriate and correct.

The option allowed as to the time of shipment was evidently intended for the benefit of the plaintiff, with some expectation perhaps, on his part, of taking advantage of the lowest rates and the most favorable time of shipment during the interval allowed. There is no stipulation as to the length of notice he should give the defendants of his decision, nor does it appear that he knew how much time they would require, after such notice, to complete the delivery. The option, to be beneficial to the plaintiff, required a precise and definite limitation of time. The length of time which the defendants would need, after notice of his decision, in order to complete the shipment, was wholly indefinite, and might depend on contingencies as to which it could hardly be expected that he would be well informed. It appears to us that the contract allowed him to express his option at any time not later than September 1; that it was sufficiently expressed by his letter of August 24; and that the fact that the defendants could not complete the delivery till after September 1 was immaterial.

The evidence offered by the defendants as to a local usage of the coal trade was properly rejected. It was an attempt, not to show a peculiar mode of doing business, but a local rule of law in the interpretation of written contracts, giving to them a meaning different from the obvious purport of the terms in which they are expressed. This, according to the rule laid down in *Dickinson v. Gay*, 7 Allen, 29, the law does not allow.

*Exceptions overruled.*

**BARNEY CORY & others vs. BOYLSTON FIRE AND MARINE  
INSURANCE COMPANY.**

A policy of marine insurance upon champagne wine, valued by the case, contained printed clauses providing that the insurers should not be liable for loss by leakage, unless occasioned by stranding or collision; nor "for damage or injury to goods by dampness, rust, change of flavor, or by being spotted, discolored, musty or mouldy, unless the same be caused by actual contact of sea water with the articles damaged, occasioned by sea perils." A vessel with such wine on board met with severe gales and stress of weather, which prolonged her voyage and caused her to ship much sea water; and upon her arrival at the port of destination all the cases were found to be more or less wet, either by the sea water, or by the steam and dampness generated in the hold by the presence of the sea water and the changes of climate through which the vessel had passed, some of the bottles, though still corked, partly empty, the cases and their contents heated, and the wine impaired in flavor and merchantable value. *Held*, that the insurers were not liable for the loss of the wine which had escaped from the bottles; nor for injury by dampness or change of flavor to cases with which the sea water had not actually come in contact.

The burden of proving a loss from a cause, and to an amount, for which underwriters are liable, is upon the assured.

In computing a partial loss under a policy of marine insurance, return duties are not to be deducted from the amount to which the underwriters are to contribute.

Under the suing and laboring clause in a policy of marine insurance, the underwriters are liable for a proportion of expenses incurred in preserving the property from the operation of the perils insured against, but not of expenses of ascertaining the amount of the loss, or refitting the goods for market.

CONTRACT upon a policy of insurance, dated January 12, 1869, for \$100,000 on champagne wine at and from Havre to Boston; 'attaching to first shipments prior to January 1, 1870;' "valued as per memorandum on back hereof;" "loss, if any, to be paid in gold." Writ dated September 4, 1869.

Indorsed upon the policy were various shipments of champagne wine, valued by the case in gold. So much of these indorsements as needs to be stated is copied below:

"Champagne wine valued as follows:

	Quarts.	Pints.	
Schreider and Dry Schreider . .	11	12	} per case, in gold.
Dry Sillery . . . . .	12	13	
Cabinet, Imperial and Verzenay .	13	14	
Carte Blanche . . . . .	15	16	

"Jan. 21. Bk. Jenny Ellingwood. | Havre to Boston. | 50,085 | 2½ | 1252.19  
gold. | Paid Feb. 27, 1869."

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The material clauses printed upon the face of the policy were as follows : " Touching the adventures and perils which the said insurance company are contented to bear and take upon them in this voyage, they are of the seas, fire, barratry of the master (unless the insured be owner of the vessel) and of the mariners, and all other sea perils and misfortunes, which have or shall come to the damage of the said wine or any part thereof, to which insurers are liable by the rules and customs of insurance in Boston (excepting such losses and misfortunes as are referred to by clauses in this policy) ; provided, that the insurers shall not be liable for any partial loss on " certain enumerated articles, " unless it amounts to " twenty, ten or seven per cent. respectively ; " nor for leakage of molasses, oil or other articles, unless it be occasioned by stranding or collision with another vessel ; nor for any partial loss on other goods, or on the vessel or freight, unless it amounts to five per cent., exclusive, in each case, of all charges and expenses incurred for the purpose of ascertaining and proving the loss ; but the owners of such goods shall recover on a general average."

" It is further agreed that the insurers shall not be liable for damage or injury to goods by dampness, rust, change of flavor, or by being spotted, discolored, musty or mouldy, unless the same be caused by actual contact of sea water with the articles damaged, occasioned by sea perils."

" And in case of any loss or misfortune, it shall be lawful and necessary for the insured, their factors, servants and assigns. to sue, labor and travel for, in and about the defence, safeguard and recovery of the said wine or any part thereof, without prejudice to this insurance ; and the acts of the insured or insurers, in recovering, saving and preserving the property insured, in case of disaster, shall not be considered a waiver or acceptance of an abandonment ; to the charges whereof the said insurance company will contribute in proportion as the sum insured is to the whole sum at risk."

" And in case of loss, such loss shall be paid in sixty days after proof and adjustment thereof."

The declaration (annexed to which was a copy of the policy and indorsements) alleged that, in the latter part of January

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1869, "four thousand cases and baskets of champagne wine, belonging to the plaintiffs, were placed on board the said barque Jenny Ellingwood at Havre, and the said barque proceeded on her voyage direct from said Havre to Boston, and while proceeding on said voyage was by perils insured against in said policy, and through the dangers of the seas, and the force and violence of the winds and waves and stormy and tempestuous weather, greatly damaged and opened in her seams and rendered leaky in her planks, and shipped and took in great quantities of water, and was caused to pitch and roll and labor, and was tossed about, and in consequence thereof, and by reason of contact with sea water, occasioned thereby, during said voyage, the said cases and baskets, and the contents thereof, and the bottles of wine therein, were broken, wetted, spoiled and damaged, and rendered of little value, whereby the plaintiffs sustained great loss, namely, an average loss of \$27,262, gold, upon the market value of said wine; of all which the defendant corporation had due notice, and received the preliminary and adjusted proof of said loss and of said corporation's proportion thereof, namely, \$15,151.11, on the first day of July last past, and were bound by the terms of said policy to pay the same in sixty days thereafter; and the plaintiffs were also put to great charges and expenses in recovering, saving and preserving the said insured property, to wit, the sum of \$1760.59 in legal currency or treasury notes of the United States; and the said corporation promised and were bound to pay said last named sum of \$1760.59 in legal currency; and the defendant corporation owes the plaintiffs said sums, namely, \$15,151.11 in gold, and \$1760.59 in legal currency or treasury notes."

Trial in this court, before *Ames, J.*, who reserved the case for the determination of the full court upon a report of all the evidence; which tended to show that the barque Jenny Ellingwood left Havre in a seaworthy condition, with a cargo including four thousand cases of this wine, but met with severe gales and heavy seas, which strained her and caused her to leak and ship much water, prolonged her voyage and impelled her to pursue a more southern course than usual; that the wine was packed with straw and paper in cases of a dozen quart bottles or two dozen pint

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bottles each ; that on her arrival in Boston it was found, upon unpacking and examination, that all the cases were more or less wet, either by sea water, or by the steam and dampness generated in the hold by the presence of the sea water and the changes of climate through which the vessel had passed, the labels on the bottles defaced, the coverings of the corks injured, some of the bottles broken, and others partly empty, the cases and their contents heated, and the wine in a high state of fermentation, and impaired in flavor and in merchantable value ; that the plaintiffs paid the duties at the custom-house, and received back part thereof on account of such damage ; and that the market value of the wine in Boston, in gold, as estimated by appraisers agreed on by the parties, would have been, if uninjured, \$89,615, and was, in its damaged condition, \$62,352.38, showing a difference of \$27,262.62.

The plaintiffs contended that the defendants were liable for such proportion of the sum last named as the amount insured, or \$50,085, bore to the whole amount at risk, or \$89,615 ; and admitted that they stood their own insurers for the rest of the loss ; and claimed to recover of the defendants, as their proportion of the partial loss, \$15,151.11, in gold.

“ The defendants’ counsel proposed that the case should be reserved for the full court ; and stated that they contended there was not evidence to warrant the jury in finding that, by a peril insured against by the policy declared on, there was a loss of five per cent., within the true meaning and legal effect of said policy ; nor was the evidence such as would warrant the jury in finding any particular amount of loss, exceeding five per cent., caused by a peril insured against, for which the defendants were liable under the terms of said policy ; that the amount of return duties received by the plaintiffs should be deducted from the amount of any loss sustained by them from perils insured against ; that in no event could the defendants be liable for more than their proportion of such expenses of examining, repacking and refitting the wine for market, as had reference to preserving the wine from further damage begun by a peril insured against ; nor more than a proportion of said expenses, if there had been a loss under the

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policy for which the plaintiffs were entitled to recover in said action ; and that upon the evidence the defendants were not liable for any part of this claim.

“ With consent of the defendants, a verdict was then taken for \$15,125.27 in gold, and \$1845.93 in legal currency ; the amount in gold being the amount of damage to the goods insured as claimed by the plaintiffs ; and the amount in legal currency being a nominal sum for the proportion of expenses to be borne by the defendants for examining, repacking and refitting the same for market. If the court shall be of opinion that the jury were warranted in finding a verdict for the plaintiffs for the above sum in gold for the damage to the goods insured, the verdict shall stand for that amount, and for such further amount in legal currency as shall be determined by an assessor, under such instructions in point of law as the court shall think fit to be given ; otherwise, the verdict is to be set aside and a new trial granted, with liberty to either party to move the court that the case be sent to an auditor.”

*B. R. Curtis & W. Curtis*, for the defendants.

*E. D. Sohier & C. A. Welch*, for the plaintiffs, besides authorities referred to in the opinion, cited *Donnell v. Columbian Insurance Co.* 2 Sumner, 366, 380 ; *Palmer v. Warren Insurance Co.* 1 Story, 360, 364 ; *Hoffman v. Aetna Insurance Co.* 32 N. Y. 405 ; *Woodruff v. Commercial Insurance Co.* 2 Hilton, 122, 130 ; 1 Duer on Ins. 210, 211 ; 1 Phil. Ins. (3d ed.) § 1129.

GRAY, J. By the general law of insurance, underwriters against perils of the sea and other usual perils do not assume the risk of ordinary perils incident to the course of the voyage, nor of damage arising from intrinsic qualities or defects of the thing insured, including waste from ordinary leakage of liquors. 1 Phil. Ins. §§ 1086, 1089, 1090.

The clause in the policy before us, which provides that the insurers shall not be liable for leakage, unless occasioned by stranding or collision, exempts them from liability for all leakage, ordinary or extraordinary, and from whatever cause, whether gradual or violent in its operation, except those specified. When bottles which have once been filled and corked are found partly

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empty, while the bottles are still whole, and the corks in their places, the deficiency, whether called "ullage," or "wantage," or by any other name, can only have arisen from leakage. The defendants therefore are not liable for such deficiency.

Independently of the peculiar provisions of this policy, underwriters are not liable for injury to goods by the ordinary dampness of the hold, though aggravated by the length of the voyage and the variety of climate through which the vessel has passed in consequence of perils of the sea, because such injury is still, if those perils do not otherwise operate upon the goods, attributable to the nature of the goods themselves, and not to the perils of the sea, as the proximate and efficient cause; but they might have been held liable for injuries occasioned to the goods from an extraordinary formation of steam or gases, arising from an extraordinary access of sea water into the hold by reason of perils of the sea. *Baker v. Manufacturers' Insurance Co.* 12 Gray, 603. *Montoya v. London Assurance Co.* 6 Exch. 451. *Taylor v. Dunbar*, Law Rep. 4 C. P. 206.

In *Baker v. Manufacturers' Insurance Co.* 12 Gray, 603, decided by this court in 1851, the facts curiously resembled those in the present case. The policy was upon delicate French goods on a voyage from Havre to Boston. The vessel had an extraordinarily long passage, and met with repeated gales and stormy weather, which drove her south of her usual course, and caused her to ship heavy seas, and to strain and open her seams, but not to leak much. Upon examination of the cargo after arrival, many of the cases appeared to have been wet with salt water; some cases were damp in which there was no indication of salt water, and in some of these the goods were as much damaged as in those that appeared to have been wet; there appeared to be no difference in the nature of the damage, which consisted of discoloration and mould; and some of the witnesses were unable to determine how many of those cases the contents of which were damaged had been wet with salt water. It was held, that the insurers were liable for the damage to the goods, occasioned by their being wet with salt water; that they were not liable for any damage from the ordinary dampness of the hold, though aggra-



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vated by the length and circumstances of the voyage; and that for the goods not found to be actually wet with salt water, but damaged by being spotted and stained, it not being shown whether such damage was occasioned by the ordinary dampness of the hold upon such a voyage, or by an extraordinary formation of steam and gases, occasioned by an extraordinary access of sea water, caused by perils of the sea, the plaintiffs could not recover.

In *Montoya v. London Assurance Co.* 6 Exch. 451, decided in the same year by the English court of exchequer, a vessel laden with hides and tobacco encountered much bad weather, and shipped large quantities of sea water, which wet and putrefied the hides, and caused them to ferment, but did not come in actual contact with the tobacco or the packages containing it; but, in consequence of the fetid odor created by the fermentation of the hides, the tobacco was damaged and deteriorated in flavor; and it was held, that the damage thus occasioned to the tobacco was a loss by perils of the sea as the proximate cause.

The provision in the policy in suit, by which "it is agreed that the insurers shall not be liable for damage or injury to goods by dampness, rust, change of flavor, or by being spotted, discolored, musty or mouldy, unless the same be caused by actual contact of sea water with the articles damaged, occasioned by sea perils," was evidently inserted with a knowledge of these two decisions, and with the intention of defining the liability of the insurers under similar circumstances. It expressly limits their liability for damage or injury by dampness, or by change of flavor or such other deterioration in quality as is a common result of dampness, to such effects when caused by actual contact of sea water with the articles damaged, occasioned by sea perils. It is not enough to bring a case within this clause, that perils of the sea should be the efficient, and, within the rule laid down in the previous decisions, the proximate cause, by which the sea water was shipped, which, more or less directly, operates upon and injures the goods; or that the sea water should come in contact with part of the cargo, but it must come into actual contact with the articles, for the damage to which the underwriters are sought to be charged. And we are of opinion that when the goods in question are not

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loaded in bulk, but packed in cases separately valued, the insurers are liable for the damage occasioned by dampness or its effects to those packages only, with which the sea water comes into actual contact, and not for the injury resulting from such dampness to other packages not touched by the sea water. It was suggested, though not strongly urged, that this provision must be restricted in its application to solids only, and therefore does not affect this case. But we cannot yield to that suggestion. Change of flavor may occur in liquids as well as in solid articles, and dampness may injure the packages containing the one, and consequently the contents, as well as the other. The champagne being valued by the case, the effect of this clause is, that, so far as the sea water came into actual contact with any case or package, the defendants are liable for any injury occasioned either by such direct contact, or by any heat or dampness thereby generated, to the same package, but not for any injury by dampness or change of flavor to other packages, no part of which had been brought into actual contact with the sea water.

The policy further provides that the insurers shall not be liable for any partial loss, unless it amounts to five per cent., exclusive of charges and expenses incurred in ascertaining and proving the same. And it is well settled that the burden of proving a loss from a cause, and to an amount, for which the insurers are liable, is upon the assured. *Baker v. Manufacturers' Insurance Co.* 12 Gray, 603. *Leftwitch v. St. Louis Insurance Co.* 5 Louisiana Annual, 706. *Heebner v. Eagle Insurance Co.* 10 Gray, 131. *Paddock v. Commercial Insurance Co.* 104 Mass. 521.

The loss, as estimated by the appraisers, and for the defendants' proportion of the full amount of which the verdict was returned, was the entire damage, whether from breaking of bottles, emptiness or ullage, or deterioration in quality and merchantable value; and the evidence did not show how much of this injury was caused by actual contact of sea water with the packages injured, and how much by steam or dampness in the hold, or the inherent qualities or defects of the wine. According to the terms of the report, the verdict must therefore be set aside and a new trial granted.

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The return duties, received by the plaintiffs from the custom-house, should not be deducted from the amount to which the insurers are to contribute. All the authorities agree that the underwriters have nothing to do with freight, duties or charges whether the partial loss is made up by reference to the value of the goods on board at the port of destination, or the net proceeds of the sales thereof there, deducting all charges; or by the more usual rule, (which appears to have been assumed in this case,) of taking the market value of the goods after being landed and all freight, duties, truckage, storage and other charges paid, or, in other words, the gross proceeds of sale. In the former alternative, the duties do not enter at all into the computation of the loss. In the latter alternative, they are not computed as a distinct item, but the market value of the goods on shore at the port of destination is assumed as the standard, by the proportion between which and the valuation in the policy the partial loss is to be estimated. It is true that into such market value enter not only the original cost and the freight, but also the duties and other charges of landing, as well as the merchant's profits. But even if the goods should arrive at a falling market, and their gross market price upon a sale in the port of destination would not equal the cost and freight, that price would not the less be the standard of adjustment. It does not affect this standard, and is of no consequence to the insurer, whether the duties have or have not been demanded and paid, or whether a portion of the duties is remitted upon the damaged goods before payment, or, after having been once exacted, is refunded. In either event, the duties, from payment of which the damaged goods have been exempted, do not increase the value of those goods when landed, or diminish the amount of the damage, but only show that by reason of the damage occurring on the voyage this portion of the goods was not rightly liable to duty. *Lewis v. Rucker*, 2 Burr. 1167. *Johnson v. Sheddon*, Burn on Ins. 154, 167, and 2 East, 581. *Usher v. Noble*, 12 East, 639. *Lawrence v. New York Insurance Co.* 3 Johns. Cas. 217. 2 Phil. Ins. § 1464. *Stevens & Benecke on Average* (Am. ed.) 308 *f seq.*, 330 *f seq.* *Hopkins on Average* (3d ed.) 238 *f seq.*

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First National Bank of Chelsea v. Goodsell.

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Under the suing and laboring clause in the policy, the insurers are liable for a proportion of any reasonable expenses incurred in preserving the subject insured from the operation of the perils insured against. *Kidston v. Empire Insurance Co.* Jaw Rep. 1 C. P. 535, and 2 Ib. 357. But they are not liable for expenses of the examination by appraisers for the purpose of ascertaining the amount of the loss, nor for the expenses of refitting the wine for market. As the nominal sum in currency, for which the verdict was returned, included all these, it cannot stand; but it must be referred to an assessor to ascertain what, if any, part of the expenses was sustained in preserving any of the cases of wine from further damage by the operation of the sea water which had come into actual contact with them. *Verdict set aside*



FIRST NATIONAL BANK OF CHELSEA vs. PRIAM B. GOODSSELL  
& another.

At the trial of an action on a bill of exchange, brought by indorsees thereof against the acceptor, to which the defence is that the payee obtained the acceptance by fraud and the other parties took the bill with knowledge thereof, the acceptor, for the purpose of showing a course of business between the indorsees and indorser by which the former were in the habit of taking negotiable paper from the latter, knowing that he was engaged in buying tainted notes and passing them to third parties so as to give a good title, may introduce evidence to show what other paper the indorsees had of the indorser, and what business they had done with him, before taking the bill in suit.

CONTRACT against Priam B. Goodsell and Samuel A. Way, on a bill of exchange drawn by Leon Chautard, payable at sight to his own order, on Goodsell, accepted by Goodsell, and bearing the indorsements of Chautard and Peter B. Rickard and a guaranty of payment by Way. Goodsell answered that his acceptance was obtained by fraud and without consideration, and that the plaintiffs took the bill with knowledge thereof. Way's answer was a general denial.

At the trial in the superior court, before *Reed, J.*, the plaintiffs put the bill in evidence, and rested their case. Goodsell intro-

duced evidence tending to show that the bill was obtained from him by Chautard through fraud and without consideration, and was transferred successively to Rickard and Way with knowledge on the part of both that it was invalid in its inception.

Goodsell then called one Stebbins, president of the plaintiff bank, who testified that he acted solely for and attended to the matters of the plaintiffs; that he took the bill by discount, from Way, with some other bills at the same time; that he had the whole charge of the matter of the bill; "that, not knowing the parties to the bill, he asked Way to guarantee it, and he did so; that he made no inquiries about it or the parties, but took it on the guaranty of Way alone; that after it was due he called upon Way, and asked him to collect it out of the other parties, and said and did nothing more, and carried it to counsel for suit; that he knew Way to be perfectly good, but did not ask Way for, and Way did not give him, the amount of the bill or anything else for it, or claim that he had any defence to it on his part; that the bill was not taken up by Way, nor any other put in its place; that he did not tell Way, when the bill was offered, that it was tainted all over, or anything of the kind, in words or substance; that he had an interview with Goodsell, at a time and place named, on State Street, afterwards, but did not tell him in words or substance that this was so, and that he had so told Way; that he had an interview with Goodsell in New York afterwards, but did not tell him then and there that the bill did not lie under protest five minutes, either in words or substance;" and the witness assumed to state what was said at those interviews. Goodsell was afterwards called, and testified "that Stebbins did tell him at the time and place named, on State Street, that he took the bill with twenty other bills at the same time, and told Way when he looked at the bill that it was tainted all over, and got him to guarantee this when he did not do so with the other bills taken at the time; that in New York, at the time and place stated, he spoke to Stebbins again about opening an account at his bank, and alluded to the bill and the plaintiffs' calling on the last party first; and that Stebbins said the bill did not lie under protest five minutes."

Stebbins being an adverse witness, the judge permitted Goodsell to put leading questions to him. Goodsell contended that he could prove, or proposed to prove, "that Way was engaged and in the habit of buying tainted and invalid notes, and in passing them off so as to get them into the hands of other parties, to make a good title if possible in their hands, and that Stebbins was the party whom he used for this purpose;" and he asked Stebbins what other notes he had had of Way, and what business he had done with him, before taking this bill. The plaintiffs objected; and Goodsell stated that he proposed "to show by the course of dealing between the parties, and their other transactions and their relations to each other, that there was an understanding and an agreement between them that Stebbins, acting as president for the plaintiffs, should take paper of Way without asking any questions, knowing that he was good; and that he was engaged and in the habit of buying tainted and invalid notes, and desired to pass them off to a third party, so as to give a better title; and that he was only required to guarantee or indorse them, and they would collect out of the other parties; that the witness was adverse; and that the fact could only be proved by proving their relations and course of dealing in that respect, and by inferences from facts, while perhaps the witness would deny the direct question." The judge excluded the evidence, although Goodsell also stated that it was offered as part of a course of inquiry into the business relations of the parties.

At the close of Goodsell's evidence, the plaintiffs, without saying, and declining to say on inquiry from Goodsell, whether they rested their case there or proposed to put in evidence in rebuttal, asked the judge to rule that no defence had been made out Goodsell, on being called upon by the judge, contended that the plaintiffs must first state whether they rested their case there or proposed to put in more evidence in rebuttal; and said that, when the evidence was all in, he wished to argue the questions of fact to the jury, and have the case submitted to them with such instructions as the judge might give, and that he should then have some prayers for instructions which he should ask to be given to the jury, but that he did not wish to discuss further the law or the

facts then, nor until the case was all in on the plaintiffs' part. The judge thereupon, without requiring the plaintiffs first to rest their case there, ruled that there was no evidence for the jury, and that Goodsell's evidence did not tend to establish any defence, and directed a verdict for the plaintiffs. The defendant Goodsell alleged exceptions. Other points raised in the bill of exceptions are not now material.

*A. A. Ranney*, for Goodsell.

*J. P. Healy*, for the plaintiffs.

COLT, J. The defendant Goodsell must show, as one step in his defence, want of consideration between the original parties to the acceptance. Upon its appearing that the bill was discounted in the usual manner at the plaintiff bank before maturity, it must further be made to appear that the plaintiffs and the prior indorsers took it in bad faith, and with notice, actual or constructive, of the original infirmity. If upon both these points he offered evidence sufficient in law to justify a finding in his favor, the case should have been submitted to the jury. If he failed in either, then at the close of his evidence it was proper for the court, on the plaintiffs' motion, or without motion, and without requiring the plaintiffs to say whether they proposed to put in any evidence in reply, to take the case from the jury and direct a verdict for the plaintiffs. *Goodman v. Simonds*, 20 How. 343. Story on Promissory Notes, (4th ed.) §§ 190, 197, and note.

Upon a careful examination of this record, we think there was evidence for the jury admitted, or offered and excluded, tending to establish both branches of the defendants' case. The doubt is, as to the evidence offered to defeat the plaintiffs' title as *bond fide* holders. This evidence comes wholly from the president of the bank. He was called as a witness by Goodsell only. He testified that, acting for the bank, he took the bill for discount, and, not knowing the parties, he asked Way, from whom he received it, to guarantee it; that he made no inquiries about it, or the parties, but took it on the guaranty of Way alone, whom he knew to be perfectly good. This was all the evidence, except what appears upon the face of the paper itself, relating to the circumstances under which this particular bill was discounted.

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It is true that under the provisions of the St. of 1869, c. 425, the witness was asked if he had made statements at other times inconsistent with his testimony, and, upon his denial, evidence of such statements, made after the bill was discounted, was produced, to the effect that he knew when he took the bill that it was tainted. But these naked declarations at other times are admitted only as one mode, under the statutes, of discrediting the witness, to be considered by the jury only in weighing his testimony, and not as substantive evidence of the truth of the facts stated.

Goodsell claimed the right to show, by this witness, the course of dealing between the parties in other similar transactions, for the purpose of proving that there was an understanding and agreement between the president of the bank and Way, that the bank should take paper of Way, knowing that he was engaged in buying tainted and invalid notes and passing them to a third party so as to give a good title. The witness was asked what other notes he had taken of Way and what business he had done with him before taking this bill; but the court excluded the evidence, although stated to be offered as part only in a course of inquiry into the business relations of the parties. There is some color for the suggestion that the judge by this ruling did not in fact intend to exclude evidence properly presented of the general course of business between the parties in these respects, but only refused to allow Goodsell to attempt to establish a fact which must have been within the direct knowledge of a witness called by him, by a cross-examination of that witness. If this were so, then as the right of a party to put leading questions, or to cross-examine his own witness, is a matter resting in the discretion of the court, no exception would lie to the ruling. But upon the whole we think this is not the true construction of this record. The ruling of the court prevented Goodsell from proving by any evidence the previous course of dealing stated, without reference to the form in which the question was put.

It is well settled that such general course of dealing may be shown, as giving character to a particular transaction within its scope, and as affording an inference that a bill discounted within it was so discounted with constructive notice of any exist-



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ing infirmity. The evidence offered under this head should have been admitted. *Merriam v. Granite Bank*, 8 Gray, 254.

Many exceptions were taken to the exclusion of evidence offered to prove original want of consideration, but they need not now be considered, and may never again arise or become material.

*Exceptions sustained.*

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 JOHN MCCONOLOGUE'S CASE.
 

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This court, or a justice thereof, has jurisdiction, upon the petition of a minor or of his father, to issue a writ of *habeas corpus* to inquire into the validity of his imprisonment or detention in this Commonwealth under an alleged enlistment in the army of the United States, and, if the enlistment be found to be illegal, to discharge him from the custody of the military officer holding him.

The acts of congress of 1864, cc. 13, 237, authorizing and directing the secretary of war to discharge minors enlisted without the consent of their parents or guardians, do not affect the jurisdiction of the courts to discharge them upon *habeas corpus*.

The judicial discharge of a person upon *habeas corpus* conclusively determines that he was not liable to be held in custody upon the state of facts then existing.

The omission of the person in whose custody the prisoner is found to make the written statement or return required by the Gen. Sts. c. 144, § 12, to a writ of *habeas corpus*, does not impair the effect of a discharge ordered by the court or judge after hearing both parties.

The decision of a justice of this court upon a writ of *habeas corpus*, discharging a person from detention under his enlistment in the army of the United States, upon the petition of his father alleging him to be a minor enlisted without his consent, and after the military officer detaining him has appeared and been heard, is conclusive that he was a minor, and not subject to be held as a soldier either by virtue of his enlistment or under any previous arrest or charge for desertion; and entitles him to be again discharged upon a writ of *habeas corpus* granted on his own petition, if he is retaken by the military officer upon either of those grounds, or under a subsequent despatch from the secretary of war directing him to be arrested wherever found and sent out of this state.

HABEAS CORPUS, issued December 6, 1870, upon the petition of John McConologue by his next friend Neil Kenney, verified by the oath of the latter, which represented that McConologue was a minor, of the age of nineteen years, residing with his parents at Woburn in the county of Middlesex and this Commonwealth; that on August 19, 1870, he was enlisted by Charlie Wheaton of the United States army, and by said Wheaton unlawfully restrained of his liberty; that on November 15, 1870

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James McConologue, his father, applied to this court for a writ of *habeas corpus*, which was granted, and on the same day a hearing was had by this court upon the facts in the case, the said Wheaton appearing in court with him, and at the close of that hearing he was discharged from the custody of said Wheaton; and that on this 6th day of December 1870 the said Wheaton, or persons acting under his authority, had forcibly seized and arrested him, and now held him in custody, restrained and deprived of his liberty, at No. 2 Bulfinch Street in Boston, "the said Charles Wheaton claiming to act under the pretended authority of the secretary of war of the United States."

To this writ the following return or statement was made in writing, under oath of the respondent, and filed December 10, 1870 :

" Charles Wheaton, a captain in the army of the United States, now recruiting officer at Boston in the county of Suffolk, comes into court and claims the custody and possession of the said John McConologue, and makes the following statement :

" That the said John was duly enlisted and mustered into the service and army of the United States, at Boston aforesaid, on or about the 17th day of August 1870, by him, the said Wheaton, being then and there an officer in the army of the United States, and having charge of the business of recruiting and enlistment in said Boston; that said John then and there signed a declaration of enlistment, a copy whereof is hereto annexed,\* and also

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\* "I, John McConologue, born in Woburn in the state of Massachusetts, aged twenty-two years, and by occupation a carrier, do hereby acknowledge to have voluntarily enlisted this 17th day of August 1870, as a soldier in the army of the United States of America, for the period of five years, unless sooner discharged by proper authority; do also agree to accept such bounty, pay, rations and clothing as are or may be established by law. And I, John McConologue, do solemnly swear that I will bear true faith and allegiance to the United States of America; and that I will serve them honestly and faithfully against all their enemies or opposers whomsoever; and that I will observe and obey the orders of the President of the United States, and the orders of the officers appointed over me, according to the Rules and Articles of War.

" John McConologue.

" Sworn and subscribed to at Boston, Mass., this 17th day of August 1870,  
before  
C. Wheaton, Capt. U. S. A., R. O."

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took an oath of enlistment as to his age, a copy whereof is hereto annexed ; \* that, on or about the 19th day of said August, said John, having received rations and subsistence from the said United States, for which the United States made payment, did desert from the service of the United States, at Boston aforesaid, and was registered and reported as a deserter from said service ; that on or about the 14th day of November last said John voluntarily returned to the custody of said Wheaton, and surrendered himself as a deserter, and was placed in confinement for said crime under the laws of the United States, and again under pay and subsistence from the United States ; that on the 15th day of said November said John was taken from said respondent's custody on a writ of *habeas corpus* issuing from the supreme judicial court and dated on said 15th day of November ; that, on a hearing of the cause the same day, the said court entered an order for the discharge of said John from the custody of said Wheaton, by the order of the Honorable Seth Ames, one of the justices of said court ; but that said John was there forcibly in the custody of said court ; that said Wheaton made due report thereof to the secretary of war of the United States ; that by an order dated the 30th day of said November, and signed by E. D. Townsend, the adjutant general of the army, a copy whereof is hereunto annexed,† said Wheaton was, by direction of the secretary of war,

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\* "I, John McConologue, desiring to enlist in the army of the United States for the term of five years, do declare that I am twenty-two years and months of age ; that I have neither wife nor child ; that I have never been discharged from the United States service on account of disability, or by sentence of a court martial, or by order before the expiration of the term of enlistment ; and I know of no impediment to my serving honestly and faithfully as a soldier for five years.

" Given at Boston, Mass., the 17th day of August 1870.

" John McConologue.

" Sworn and subscribed to at Boston, Mass., this 17th day of August 1870 before

C. Wheaton, Capt. U. S. A., R. O.

" Witness : Chas. F. Clark, L. Sergt."

† " Adjutant General's Office, Washington, Nov. 30, 1870. Capt. Chas Wheaton, U. S. A. Recruiting Officer, Boston, Mass. Sir : Referring to your report in the case of recruit John McConologue, U. S. A., forwarded through

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McConologue's case.

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ordered to rearrest said John ; that in pursuance of said order said Wheaton caused said John to be arrested on the 6th day of December current by one Charles F. Clark, a sergeant in the army ; that said John was again forcibly taken from the respondent by virtue of a writ of *habeas corpus* issuing from said court and dated on said 6th day of December, on which the said Wheaton, the claimant of said John McConologue, now prays to be heard.

“ Said Wheaton further says that he reported the desertion of said John McConologue on or about the 20th of August 1870, to the proper officers, and that said John was then, and is now, liable to be tried by a court martial for violation of the 20th Article of War, of the act of congress of April 10th, 1806.

“ The respondent hereto further respectfully represents, that all these proceedings in this honorable court were taken before this respondent could in due course of law present the necessary charges or indictment against the said deserter McConologue to the authority competent by law to pass upon the same and assemble a general court martial for the trial of said McConologue under the laws of the United States, for said crime ; but this respondent respectfully avers and maintains that there is sufficient probable cause to induce a belief that said McConologue has committed said crime, and that he, this respondent, has taken his action under the orders of the President of the United States, which he was required by law, on accepting his commission as captain, to execute.

“ This respondent further respectfully pleads to the jurisdiction in the premises, and respectfully requests that this writ may be dismissed and the soldier remanded to his custody.

“ C. Wheaton, Captain U. S. Army, R. O.”

The petitioner by his next friend filed a written traverse of this return, denying “ that he was a deserter as set forth in the

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the Supt. Genl. Recruiting Service, New York City, I have to inform you that the secretary of war directs that he be arrested wherever found, and sent out of the state of Massachusetts.

“ I am very respectfully your obedient servant,

“ E. D. Townsend, Adjutant General.”

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 McConologue's case.
 

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return of Charles Wheaton, or at the time that he petitioned for said writ that he was held and detained as such deserter."

The hearing was before *Wells, J.*, who adjourned the case into the court held for the county of Suffolk, and reserved it for the consideration of the full court upon the papers in both cases, (the substance of all which is stated above, except the petition in the first case, which is copied in the margin,\*) and the following facts and findings :

"The said parties appearing with counsel, the court found as facts, that John McConologue did enlist on the 17th day of August 1870, and was at the time of his enlistment but nineteen years of age, and that he enlisted without the knowledge or consent of his parents or either of them ; that within two days after

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\* "The petition of James McConologue respectfully represents, that he is a resident of the town of Woburn, of the county of Middlesex and Commonwealth of Massachusetts ; that he has a minor son of the age of nineteen, named John McConologue, who was enlisted into the military service of the United States on or about the 19th day of August last, for the term of five years, by Captain Charles Wheaton, having his office and place of enlistment at No. 2 Bulfinch Street in Boston, in the county of Suffolk and Commonwealth aforesaid, without the knowledge or consent of your petitioner, without whose consent he avers and believes said enlistment was and is void.

"And your petitioner further represents, that his said minor son is deprived and restrained of his liberty at said No. 2 Bulfinch Street, by the said Captain Charles Wheaton, or by officers and persons under his charge and direction ; that your petitioner has represented to the said Captain Charles Wheaton that the said John McConologue is a minor, and that he, your petitioner, refuses to give his consent to the enlistment ; but that the said Captain Charles Wheaton refuses to release the said John McConologue, and is about sending him out of the jurisdiction of this court, for the purpose of compelling him to perform military service.

"Wherefore your petitioner respectfully prays your honors to grant a writ of *habeas corpus* to be directed to Captain Charles Wheaton and his officers having charge of the said John McConologue, commanding him and them to bring the said John McConologue before your honors, to do, submit to and receive what the laws may require.

James McConologue.

"In presence of Henry D. Hyde.

"Suffolk, ss. Boston, November 15th, 1870. Subscribed and sworn to this 15th day of November A. D. 1870, before me,

"Henry D. Hyde, Justice of the Peace."

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his enlistment he deserted, and on the 19th day of August 1870 was reported by Captain Wheaton to the adjutant general of the army as a deserter, and was at the time registered as such; that on the 15th day of November he voluntarily returned to the office of said Wheaton, and was immediately ordered into custody as a deserter, by the verbal order of Captain Wheaton; that he was taken from such custody upon a writ of *habeas corpus* issued by this court on the 15th day of November, and upon hearing was discharged by this court; that at such hearing both parties appeared with counsel, and that no return was filed by the respondent; that on the 6th day of December the said Wheaton, as set forth in his return, did by verbal order arrest the said McConologue, by order of the secretary of war, and at the time of the serving of this writ claimed to hold him as a deserter, as set forth in his return, and was about transporting him to New York as a deserter at the time of the serving of the writ; that the said McConologue did receive from the United States one day's rations before deserting, but had received no money as pay, or uniform; and that the said McConologue offered to prove that at the time he was reported as a deserter the said Wheaton had been informed that he was a minor and that his parents objected to his enlistment; but the court ruled that the evidence was immaterial."

The writ in each case was in the form prescribed by the Gen. Sts. c. 144, § 6, and was issued by this court and signed by the clerk, and served by a deputy sheriff, in accordance with § 7.

*H. D. Hyde*, for the petitioner, upon the general question of the jurisdiction of the state courts, besides some of the cases cited in the opinion, referred to *Turner's case*, 5 Phila. 296; *Henderson's case*, Ib. 299; *Shorner's case*, 2 Carol. Law Repos. 55; *Merritt's case*, 5 Hall's Law Journal, 497; *Dobbs's case*, 21 How. Pract. 68; *Webb's case*, 24 How. Pract. 247.

*A. B. Gardner*, (of New York,) for the respondent, upon the same question, further cited *Keeler's case*, Hempst. 306; *Vermaitre's case*, 9 N. Y. Leg. Obs. (May 1851) 129, 135, *Siford's case*, 5 Am. Law Reg. 659; *McDonald's case*, 9 Am. Law Reg. 661; *Farrand's case*, 1 Abbot U. S. 140; *In re Neill*, 8 Blatchf. C. C. 156; *Roberts's case*, 2 Hall's Law Journal, 192

*Ex parte Rhodes*, 2 Wheeler Crim. Cas. 559; *State v. Zulich*, 5 Dutcher, 409; *Jordan's case*, 2 Am. Law Reg. (N. S.) 749; *Hopson's case*, 40 Barb. 34; *O'Connor's case*, 48 Barb. 258; *S. C.* 3 Abbott Pract. (N. S.) 137; *Rielly's case*, 2 Abbott Pract. (N. S.) 334; and many unreported cases; and to the point that the authority to discharge from enlistment on the ground of minority was exclusively in the secretary of war, U. S. Sts. 1864, cc. 13, 237; *Cline's case*, 1 Benedict, 338; *Stokes's case*, Ib. 341; *Riley's case*, Ib. 408; and *O'Connor's case*, *ubi supra*.

GRAY, J. By the Gen. Sts. c. 144, § 1, "every person imprisoned or restrained of his liberty, except in the cases mentioned in the following section," (all of which are of persons held under judicial conviction or process,) "may, as of right and of course, prosecute a writ of *habeas corpus*, according to the provisions of this chapter, to obtain relief from such imprisonment or restraint, if it proves to be unlawful." The person in whose custody the prisoner is found is required to make a full statement or return in writing, to the court or justice before whom the writ is returnable, of the authority and cause of the imprisonment or restraint, and at the same time to bring in the body of the prisoner. §§ 12-14. The prisoner may deny any of the facts set forth in such return or statement, and may allege any other material facts; and the court or judge is bound "to proceed in a summary way to examine the causes of imprisonment or restraint, hear the evidence produced by any person interested or authorized to appear, both in support of such imprisonment or against it, and thereupon to dispose of the party as law and justice may require," and, if no legal cause is shown for the imprisonment or restraint, to discharge him therefrom. §§ 18, 28.

The jurisdiction of the state courts to discharge upon writ of *habeas corpus* minors illegally enlisted into the army of the United States is too well settled, by the concurrent opinions of the highest judicial authorities that have had occasion to pass upon it, and by a practice of more than half a century in accordance therewith, to be now disavowed, unless in obedience to an express act of congress, or to a direct adjudication of the supreme court of the United States.

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The intrinsic importance of the question, and the ability and thoroughness with which it has been argued at the bar, have induced us to recur once more to the leading decisions upon this subject.

The earliest case reported is *Husted's case*, 1 Johns. Cas. 136, in 1799, in which an application to the supreme court of New York for a writ of *habeas corpus* to bring up a man detained in custody by a captain in the army of the United States, who claimed him as enlisted under the authority of the United States, was denied, against the opinions of Lansing, C. J., and Lewis, J., by the three other judges; but it appears by the report that "Radcliff, J., and Kent, J., were of opinion that the application ought to be refused on the ground that, if the facts stated were returned on the *habeas corpus*, it would be conclusive against his discharge;" and Benson, J., was the only judge who was of opinion that the court had no jurisdiction in the case. In *Ferguson's case*, 9 Johns. 239, in the same court in 1812, Chief Justice Kent indeed expressed an opinion that the state courts had no jurisdiction to discharge a person illegally enlisted; but his associates, including Mr. Justice Thompson, (afterwards chief justice of New York and a justice of the supreme court of the United States,) distinctly avoided the expression of any opinion upon that question, and as a matter of discretion refused to grant the writ, and left the petitioner to apply to the federal courts for relief. As Chief Justice Kent afterwards said in his Commentaries, "the supreme court did not decide the question, and the motion was denied on other grounds; but subsequently, in the matter of *Stacy*, 10 Johns. 328," within the same year (in which he himself delivered the unanimous judgment of the court,) "the same court exercised a jurisdiction in a similar case, by allowing and enforcing obedience to the writ of *habeas corpus*. The question was therefore settled in favor of a concurrent jurisdiction in that case." 1 Kent Com. (6th ed.) 401. The same court again affirmed the jurisdiction in 1827 in *Carlton's case*, 7 Cowen, 471; and assumed it as unquestioned in *United States v. Wyngall*, 5 Hill, 16, while Judge Nelson (since a justice of the supreme court of the United States) was chief justice of that court. And in *Barlow's case*, 8 West-



ern Law Journal, 567, in 1850, Mr. Justice Woodruff (since appointed one of the circuit judges of the United States) said that since the decision in *Stacy's case* the jurisdiction had been constantly exercised in that state, "so constantly, indeed, that the revival of the objection at this day was the cause of some surprise."

In Pennsylvania and in Massachusetts the like jurisdiction was well established as long ago as 1813 or 1814, and has since been repeatedly asserted in published opinions of the full bench of the supreme court and in many unreported cases before single justices thereof sitting in chambers or at *nisi prius*. *Lockington's case*, 5 Hall's Law Journal, 92, 301; *S. C. Brightly*, 269. *Commonwealth v. Callan*, 6 Binn. 255. *Commonwealth v. Camac*, 1 S. & R. 87. *Commonwealth v. Fox*, 7 Penn. State, 336. *Commonwealth v. Wright*, 8 Grant, 437. *Commonwealth v. Harrison*, 11 Mass. 63. *Commonwealth v. Cushing*, Ib. 67. *Commonwealth v. Downes*, 24 Pick. 227. *Kimball's case*, 9 Law Reporter, 500. *Sims's case*, 7 Cush. 285, 309. *Sanborn v. Carleton*, 15 Gray, 399. And it has been sustained by the decisions and practice of the courts of last resort in other states. *Ex parte Mason*, 1 Murphy, 336. *State v. Dimick*, 12 N. H. 194. *Lanahan v. Birge*, 30 Conn. 438. *Disinger's case*, 12 Ohio State, 256. *Higgins's case*, 16 Wisc. 351.

The earliest reported judgments of the supreme courts of New York, Pennsylvania and Massachusetts, sitting in banc, in the cases of *Stacy*, *Lockington* and *Harrison*, above cited, derive additional weight from having been rendered upon full consideration and independently of each other.

The reasons in support of this jurisdiction are so clearly and strongly set forth by Chief Justice Tilghman of the supreme court of Pennsylvania, and by Mr. Justice Jackson of this court, in two of the earliest cases, that we deem it unnecessary to add anything to their arguments. The facts that neither of them is printed in any book of reports in common use, and that the jurisdiction has been long treated as so well established that its grounds are not fully stated in any of the later cases, justify us in quoting from them at some length.

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*Lockington's case* was that of a man held by a marshal of the United States under the authority of the President, as an alien enemy. Upon a suggestion made in the return of the marshal, that a state judge had no authority to issue a writ of *habeas corpus* in such a case, Chief Justice Tilghman expressed himself as follows :

"It is to be observed that the authority of the state judges, in cases of *habeas corpus*, emanates from the several states, and not from the United States. In order to destroy their jurisdiction, therefore, it is necessary to show, not that the United States have given them jurisdiction, but that congress possess, and have exercised, the power of taking away that jurisdiction which the states have vested in their own judges. Our act of assembly directs that in all cases, 'where any person, not being committed or detained for any criminal or supposed criminal matter, shall be confined or restrained of his liberty, under any color or pretence whatsoever,' he shall be entitled to a writ of *habeas corpus*. Now, it is no answer to this law, to say that, being made before the present Constitution of the United States was established, it could not be intended to apply to cases arising under the Constitution. The people of Pennsylvania still remain citizens of the Commonwealth, as well as of the United States ; and it is of as much importance to them to be relieved from unlawful imprisonment under color derived from the United States, as from any other imprisonment. When the present Federal Constitution was adopted, the people were not easy until they had obtained an amendment declaring that the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, were reserved to the states respectively, or to the people. A writ of *habeas corpus* must therefore be issued, in all cases where the right to issue it has not been given up to the United States."

"But that is not all. It is a principle well established, that, even in cases where congress might assume an exclusive jurisdiction, the authority of the state remains until such a jurisdiction is assumed. There are many instances in which the powers of the United States are suffered to lie dormant ; such as the power of establishing uniform laws on the subject of bankruptcies, and

while the power remains dormant, the several states regulate the subject. In subjects also within the jurisdiction of congress, when they do legislate, the authority of the states is taken away only so far as the law of the United States declares. This is exemplified in the act establishing the judicial courts of the United States, where it will be found that in some instances the courts of the United States are vested with an exclusive jurisdiction, but in many more they have jurisdiction concurrent with the courts of the several states. And although it is true that by the terms of the act the courts of the United States have only a concurrent jurisdiction, yet I apprehend the construction would have been the same if the express terms had been omitted. By the fourteenth section of the same act, power is given to the judges of the United States to grant writs of *habeas corpus* for the 'purpose of an inquiry into the cause of commitment; provided that they shall in no case extend to prisoners in jail, unless where they are in custody under, or by color of, the authority of the United States, or committed for trial before some court of the same, or are necessary to be brought into court to testify.' Now, if it had been intended to exclude the state judges, this is the place in which we might expect to find evidence of such intention; for the subject was full in the mind of the legislature, as appears by the care with which they restrained their own judges from interfering with commitments not under the authority of the United States."

"As to an attempt to take away from the state courts altogether the right of issuing a writ of *habeas corpus* in any case where a man pretends to justify an imprisonment under the authority of the United States, whenever the subject shall be brought before congress it will be found to be attended with very great, if not insuperable difficulties." "The inconvenience of clashing opinions between federal and state judges may sometimes be felt; but when I consider the situation of a Pennsylvanian, imprisoned unlawfully, by color of a pretended authority from the United States, on the banks of the Ohio or the shore of Lake Erie, with only one federal judge to whom he can apply, and that judge in the city of Philadelphia, I feel as little incli-

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nation, as I have right, to surrender the authority of the Commonwealth." 5 Hall's Law Journal, 94 *§ seq.*; Brightly, 278 *§ seq.*

In the *case of Lewis*, which was of the enlistment of a minor, Mr. Justice Jackson, after referring to *Ferguson's case*, 9 Johns. 239, said: "It appears from that case, that the law of New York differs in one respect at least from the law of this state, inasmuch as the writ of *habeas corpus* there may be granted or refused in the discretion of the court; whereas it is here declared by our statute to be 'a writ of right, to which the citizens of this Commonwealth are, by the Constitution and law of the land, at all times entitled, to obtain relief from every wrongful imprisonment or unlawful restraint of personal liberty.' St. 1784, c. 72. The right thus solemnly declared and secured would be defeated, if the court on the return of the writ should refuse to examine the causes alleged in justification of the imprisonment. Indeed the very question raised in this case could not occur, until the court had so far examined the return as to see that the party was held at least under color of the authority of the United States. And can it be supposed that a mere color of authority, which perhaps on examination would appear to be wholly mistaken or unfounded, is sufficient to deprive a citizen of his personal liberty? Supposing the laws for raising this army had been repealed, or that this soldier had been regularly discharged, and that the officer, from ignorance of the fact or from some less excusable motive, still detained the man under his command; must this court remand the prisoner and leave him in such unlawful restraint, merely because his oppressor thinks proper to allege that he is acting under the authority of the United States? The Constitution of the United States, and the laws made in pursuance thereof, are the supreme laws of the land, and have the same force and effect in this court as in the courts of the United States. Suppose, then, that the law under which this man is enlisted had expressly prohibited the enlistment under any circumstances of minors, or of any other particular description of persons; when one of that description is brought before us on *habeas corpus*, and is claimed as a soldier by the party who holds him, are we not authorized, nay, are we not bound, to declare that such enlistment is void?

"Suppose the Constitution itself had contained a prohibition like the one here supposed, and that congress should notwithstanding pass an act for the enlisting of minors; should we not be bound to declare that such act was void, and to discharge any minor enlisted under it? It is then evident that, in order to do our duty under the statute of this Commonwealth before referred to, we must examine the whole case, both as to law and fact. If on such examination it appear that the party is lawfully detained, whether under the authority of this state or of the United States, we must remand him. But if the person to whom the writ is directed rely for his justification on a mistaken construction of the law, or on an act which is repealed or in any other way void; or if the facts are not duly substantiated which are necessary to bring the case within an existing law; it is our duty to discharge the prisoner, although the officer should pretend, or really believe, that he was proceeding lawfully under the authority of the United States." 1 Carol. Law Repos. 49 *§ seq.*

The existence of this power in the state courts has never been denied by the supreme court of the United States, nor, so far as we are informed, by any judge of that court. In *United States v. Bainbridge*, 1 Mason, 71, 86, Mr. Justice Story found it unnecessary to consider how far such a jurisdiction of the state courts could reach, and simply said, "Whenever that question shall arise, it will deserve very grave consideration." In *Stearns v. United States*, 2. Paine, 300, 310, Mr. Justice Thompson spoke of the jurisdiction to discharge upon *habeas corpus* a prisoner held by an officer of the United States by color or under pretext of the authority of the United States, as one which might be assumed or declined by the state courts at their discretion. Mr. Justice Nelson, in a charge to the grand jury, reported in 1 Blatchf. C. C. 635, 642, defined the extent of the jurisdiction of the state courts as follows: "It is proper to say, in order to guard against misconstruction, that I do not claim that the mere fact of the commitment or detainer of a prisoner by an officer of the federal government bars the issuing of the writ, or the exercise of power under it. Far from that.. Those officers may be guilty of illegal restraints of the liberty of the citizen, the same as others. The

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right of the state authorities to inquire into such restraints is not doubted ; and it is the duty of the officer to obey the authority by making a return." And the only case in which he declared it to be the duty of a federal officer not to give up the prisoner upon a writ of *habeas corpus* from a state court was "when the prisoner is in fact held under process from a federal tribunal." The opinions of Mr. Justice McLean in *Norris v. Newton*, 5 McLean, 92, and Mr. Justice Grier in *Ex parte Jenkins*, 2 Wallace, Jr. 521, were similarly limited. Nor do we understand the adjudication of the supreme court of the United States in the cases of *Ableman v. Booth* and *United States v. Booth*, 21 How. 506, as going any farther than this.

Booth was originally brought before a commissioner of the courts of the United States in Wisconsin upon a charge of having committed an offence against a law of the United States, and held to bail for his appearance before the next district court of the United States having jurisdiction of the offence, and, failing to give such bail, was committed by the commissioner to the custody of the marshal of the United States, and from such commitment was discharged on *habeas corpus* by the supreme court of the state. He was afterwards, in the district court of the United States, indicted, tried, convicted and sentenced to imprisonment for the offence, and was again discharged from this imprisonment by the supreme court of the state. In each instance, the imprisonment, from which he was discharged, was under a commitment upon judicial process of the United States, in the first case to compel him to stand his trial, and in the second to punish him after he had been found guilty. It is to such imprisonment only, that is to say, imprisonment upon judicial process of the United States, that the judgments of the supreme court, upon writs of error, reversing the judgments of the supreme court of the state, could apply ; for no question arose in either of those cases, of the effect, as against a writ of *habeas corpus* from a state court, of the detention of a citizen by a mere executive officer, civil or military, of the United States, without color of judicial process or proceeding of any kind. Such was the whole effect attributed to that decision, after full consideration, and an inclination of opinion expressed in favor

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of the concurrent jurisdiction of the state courts to discharge minors illegally enlisted, by Mr. Justice Dillon (now one of the circuit judges of the United States) in *Anderson's case*, 16 Iowa, 595, and by Mr. Stanbery as attorney general of the United States in *Gormley's case*, 12 Opinions of Attorneys General, 258. And Mr. Bates as attorney general gave an opinion to the same effect. 10 Ib. 146. The same line of distinction is preserved in our own statute of 1861, c. 91, § 3, which declares that "nothing contained in the statutes of this Commonwealth shall be construed to authorize the taking of any person by writ of *habeas corpus* out of the custody of the United States marshal or his deputy, holding him by legal and sufficient process, issued by any court or magistrate of competent jurisdiction; provided, however, that this shall not affect the authority of the supreme judicial court or its justices, in accordance with the provisions of the Constitutions of the United States and of this Commonwealth, to investigate and determine upon the validity and legal effect of any process which may be relied on to defeat the writ, or any other matter properly arising."

Neither of the three remaining cases, cited by the learned counsel for the respondent, of which authentic reports have been furnished us, in which opinions adverse to the jurisdiction of the state courts in cases like the present have been expressed in the highest court of any state, required a decision upon the general question. The weight of *Spangler's case*, 11 Mich. 298, as a judicial precedent, it is not easy to estimate; for no authorities except *Ableman v. Booth* were cited by either of the judges, and, while the chief justice and one of his associates expressed opinions that the court had no jurisdiction and that the writ of *habeas corpus* should be dismissed, the third judge limited his concurrence with them upon the question of jurisdiction to the facts of the case, this judge and the remaining member of the court, as well as the chief justice, expressed opinions that upon those facts, which each of them discussed at length, the prisoner was lawfully held by the military officer, and the judgment of the court was that the prisoner be remanded to his custody. *Kneedler v. Lane*, 45 Penn. State, 238, was a bill in equity, brought during the sus-

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pension of the writ of *habeas corpus* in the recent civil war, by a man drafted under the act of congress of 1863, c. 75, and was decided upon the ground that that act was constitutional; and Justices Strong and Agnew, who, together with Mr. Justice Reed, made up the majority of the court upon the final decision, did not concur with his *obiter dicta* on pp. 293, 301 & *seq.*, (cited by this respondent,) but cautiously refrained from expressing any opinion upon the general question of jurisdiction. pp. 295, 323. In the cases of *Willis & Armistead*, 38 Alab. 429, 458, the majority of the supreme court of Alabama, differing from the chief justice, expressed an opinion in favor of their jurisdiction to discharge on *habeas corpus* a conscript who was not liable to enrolment on account of his age or other like exemption, and remanded the prisoner to the custody of the military officer upon distinct grounds.

The other cases cited on either side at the argument were decided by district judges of the United States, or by single judges or lower courts of the states, and it would be superfluous to refer to them in detail, because, in view of the many higher authorities upon the subject, they can have no controlling influence upon our decision on the general question.

It was argued for the respondent, that the acts of congress of 1864, cc. 13, 237, authorizing and directing the secretary of war to discharge minors under the age of eighteen, enlisted without the consent of their parents or guardians, took away by implication all power of any court to discharge on *habeas corpus* an enlisted person upon account of his minority; and in support of this argument several decisions in New York were referred to. But in Massachusetts it has been uniformly held otherwise, by the judges of this court, as well as of the federal courts; and the reasons have been well stated by Judge Lowell: "It has always been the right and the duty of the war department to discharge persons illegally enlisted." "While the privilege of this writ was suspended, as it was when these acts were passed, this was the only remedy, and it still is often the most convenient; but it would be contrary to all precedent to oust the jurisdiction of the courts, in a matter involving the liberty of the citizen, by a



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mere implication from the fact that the legislature has given the appropriate executive departments power to act in the premises, and that during a war, when there was, for the time, no other remedy." *In re McDonald*, 1 Lowell, 100, 106. See also, in addition to cases there cited, *Barlow's case*, 8 Western Law Journal, 567; *Gormley's case*, 12 Opinions of Attorneys General, 258, 266.

The act of congress of 1867, c. 28, providing that the courts and judges of the United States "shall have power to grant writs of *habeas corpus* in all cases where any person may be restrained of his or her liberty in violation of the Constitution or of any treaty or law of the United States," can no more impair or restrict the inherent jurisdiction of the courts of the several states, than the authority to issue writs of *habeas corpus*, conferred by the original judiciary act of 1789, c. 20, which was in force at the time of all the decisions to which we have referred.

In the light of those decisions, and of the reasons on which they are founded, we cannot avoid the conclusion that the justice of this court, before whom John McConologue was originally brought by writ of *habeas corpus*, had jurisdiction to inquire into the causes of his detention by Captain Wheaton, and, if they were found insufficient, to discharge him.

A minor's contract of enlistment is indeed voidable only and not void, and if, before a writ of *habeas corpus* is sued out to avoid it, he is arrested on charges for desertion, he should not be released by the court while proceedings for his trial by the military authorities are pending. *Dew's case*, 25 Law Reporter, 538. *Tyler v. Pomeroy*, 8 Allen, 480, 501. *Commonwealth v. Gamble*, 11 S. & R. 93. And it was argued that the fact that the petitioner had been registered and ordered into custody as a deserter before the suing out of the first writ of *habeas corpus* should be allowed the same effect.

But the decision upon that writ, after notice and full hearing, discharging him from the custody of Captain Wheaton, was an adjudication that he was not liable to be held as an enlisted soldier, and a conclusive determination of all questions of law and fact necessarily involved in that result. Any facts which the respondent deemed material upon that issue should have been

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proved at that hearing, and any ruling in matter of law with which he was dissatisfied should have been then reserved. The judicial discharge of a prisoner upon *habeas corpus* conclusively settles that he was not liable to be held in custody upon the then existing state of facts. *Ex parte Milburn*, 9 Pet. 704, 710. *Mercein v. People*, 25 Wend. 64, and 3 Hill, 399. Nelson, C. J., in *Spalding v. People*, 7 Hill, 301, 304. *Betty's case*, before Shaw, C. J. 20 Law Reporter, 455. Gen. Sts. c. 144, § 29. Neither the effect of his having been previously registered and ordered into custody as a deserter, nor either of the other questions, discussed at the bar—whether his oath that he was of age should be deemed conclusive upon that point, or whether a minor more than eighteen years old could be lawfully enlisted without the consent of his parent or guardian—is therefore now open for our consideration.

The respondent having appeared and been heard in opposition to the first writ, his omission to file the formal return in writing required by the Gen. Sts. c. 144, § 12, cannot affect the conclusiveness of the adjudication thereon.

Nor is it material that the petition for the first writ was made by the prisoner's father, and that for the present writ by himself. An application for a writ of *habeas corpus* may be made either by the person imprisoned or by any one in his behalf, and a father or guardian may always sue out a writ of *habeas corpus* for his minor child or ward. Gen. Sts. c. 144, § 4. *Commonwealth v. Harrison*, 11 Mass. 63. *Commonwealth v. Downes*, 24 Pick. 227. *United States v. Anderson*, Cooke (Tenn.) 143. Neither the form of the writ, nor the effect of the discharge, is varied by the name in which the petition is presented.

The judgment upon the first writ, therefore, was a valid and conclusive adjudication that the *status* of the minor, at the time of rendering that judgment, was that of a citizen and not a soldier. Such being the case, he could not be subject to subsequent arrest or trial by a military officer or court. *Stacy's case*, 10 Johns. 328. *Ex parte Watkins*, 3 Pet. 193, 209. *Ex parte Miligan*, 4 Wallace, 2. And there is no proof of any new proceeding since commenced against him as a deserter. The despatch of

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the secretary of war, a copy of which is annexed to the return, does not purport to be an order to arrest him as a step in such a proceeding, but simply "directs that he be arrested wherever found, and sent out of the state of Massachusetts." It is not an order to hold him for trial before a military court, but to take him out of the jurisdiction and beyond the reach of any civil court, state or federal, held within this Commonwealth.

*Prisoner discharged.\**

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### HENRY EMERY'S CASE.

The provision of the Declaration of Rights, that no subject shall be compelled to accuse or furnish evidence against himself, exempts the subject from disclosing the circumstances of his offence as well as making confession of guilt; applies to investigations ordered and conducted by the legislature, or either of its branches; is regulated therein by the same rules as in judicial or other inquiries; and is not dispensed with by any statute which fails to secure the subject from future liability, and exposure to be prejudiced, in any criminal proceeding against him, as fully and extensively as he would be secured by availing himself of the constitutional privilege.

The St. of 1871, c. 91, is ineffectual to deprive a witness before the legislative committee on the state police of his constitutional privilege of exemption from being compelled to accuse or furnish evidence against himself, inasmuch as it leaves him liable to criminal prosecution and punishment for any matter to which his testimony may relate.

HABEAS CORPUS, issued May 3, 1871, to John Morrissey, sergeant-at-arms of the general court, upon the petition of Henry Emery, which represented that the respondent was holding him imprisoned in the state house, and that the cause and pretence of the imprisonment were as follows :

That the petitioner was summoned to appear as a witness before a joint special committee of the senate and house of representatives of the general court "to inquire if the state police is guilty of bribery and corruption," and in obedience to the summons appeared before the committee at the state house, when

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\* At December term 1871 of the supreme court of the United States it was decided (the chief justice dissenting) that a state court had no authority to discharge upon writ of *habeas corpus* a minor even under eighteen years of age, held by an officer of the United States army under an enlistment made without the consent of his parent or guardian. *Tarble's case*, 13 Wallace, 397. The practice in this Commonwealth has since conformed to that decision.

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interrogatories were propounded to him which he declined to answer ;

That these facts were reported to the senate, and that body ordered the sergeant-at-arms to arrest the petitioner and bring him before the senate to answer for contempt in refusing to answer the interrogatories ;

That on May 3, 1871, the sergeant-at-arms arrested the petitioner and brought him to the bar of the senate, whereupon the senate passed an order " that the president propound to Henry Emery, now arraigned at the bar of the senate, the following question : Are you ready and willing to answer before the joint special committee, appointed by this senate and the house of representatives of Massachusetts, to inquire if the state police is guilty of bribery and corruption, the following questions, namely : *First*. Whether, since the appointment of the state constabulary force, you have ever been prosecuted for the sale or keeping for sale of intoxicating liquors ? *Second*. Have you ever paid any money to any state constable, and do you know of any corrupt practice or improper conduct of the state police ? If so, state fully what sums, and to whom, you have thus paid money, and also what you know of such corrupt practice and improper conduct ? "

That the president then and there propounded the questions ordered by the senate to the petitioner, and he answered in writing as follows : " Intending no disrespect to the honorable senate, I answer, under advice of counsel, that I am ready and willing to answer the first question ; but I decline to answer the second question, upon the grounds, *First*, that the answer thereto will accuse me of an indictable offence ; *Second*, that the answer thereto will furnish evidence against me by which I can be convicted of such an offence ; "

That the senate thereupon passed an order that, whereas the petitioner, " in contempt of the authority of this senate, did give an unsatisfactory answer to the second question," he " be committed to the custody of the sergeant-at-arms, to be by him confined in the jail of the county of Suffolk for the space of twenty-five days, or until the further order of the senate unless he shall

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sooner signify his willingness to appear and purge himself of his contempt, and testify before the joint special committee and this senate, and satisfactorily answer the questions propounded to him by the joint special committee and this senate," and "the president of the senate is hereby authorized to issue his warrant to commit said Henry Emery to the custody of the sergeant-at-arms, to be imprisoned in the common jail in the county of Suffolk," and "whenever the said Henry Emery, while under the foregoing order, shall inform the sergeant-at-arms that he is willing to testify before the said joint special committee and this senate, it shall be the duty of the sergeant-at-arms immediately to take said Emery before the senate and hold him subject to its order ;"

That in conformity with this order the president of the senate on said May 8, 1871, issued his warrant for the arrest of the petitioner ; and that it was under said warrant that the sergeant-at-arms was holding the petitioner imprisoned and restrained of liberty. A copy of the warrant was annexed to the petition.

The sergeant-at-arms made return to the writ, on May 4, 1871, at April term of this court in Suffolk, bringing the body of the petitioner into court, and annexing to the return a transcript of the record of the senate, and a duly attested copy of the warrant, under the seal of that body and the hand of its president, by virtue of which he was holding the petitioner in his custody ; said warrant being the same alleged in the petition, and reciting from the journal of the senate the various orders and proceedings upon which it was founded, substantially as alleged in the petition, save that the written answer returned by the petitioner to the question put to him at the bar of the senate was not therein specifically set forth, and concluding thus :

" These therefore are to require you, the said John Morrissey, sergeant-at-arms, to commit the said Henry Emery to the common jail of the county of Suffolk, to be there imprisoned for the term of twenty-five days, unless he shall be sooner discharged by the senate, in accordance with the terms of the order hereinbefore recited ; and the constable of the Commonwealth, his deputies, all sheriffs and their deputies, and all constables and other officers charged with the service or execution of criminal process, are

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hereby required to be aiding and assisting you in the execution thereof, and the keeper of said jail is likewise required to receive said Henry Emery, and him safely to keep as aforesaid, for all of which this shall be sufficient warrant."

The transcript of the record of the senate set forth the proceedings before the petitioner was brought to the bar of that body, more fully than they were alleged in the petition, and showed them to be as follows: The joint special committee of the general court on the state police reported to the senate, on April 17, 1871, that in the prosecution of their inquiries they summoned the petitioner to appear before them, and he appeared; that the usual oath was administered to him, and the same two questions were put to him which were afterwards included in the question put to him at the bar of the senate; that he "declined and refused to answer either of said questions, on the ground that the answers would criminate himself and tend to furnish evidence against himself, and denied the right of the legislature to require him to testify;" and that the committee asked the senate to pass an order authorizing and requiring its president "to issue his warrant to the sergeant-at-arms, commanding him to arrest" the petitioner, "wherever he may be found, and have his body at the bar of the senate forthwith to answer as for a contempt in refusing to answer the questions of the joint special committee on the state police." The report of the committee was accepted, and the order which it asked for was passed, and the president of the senate issued his warrant for the arrest of the petitioner in accordance therewith, all on April 17, 1871, the day on which the report was made. The sergeant-at-arms executed this warrant by arresting the petitioner and bringing him to the bar of the senate on May 3, 1871; and then and thereafter, on that day, the additional orders were passed by the senate, and other proceedings had, and the additional warrant issued, under which the sergeant-at-arms sought to justify his present holding of the petitioner, and which were fully alleged in the petition.

At the hearing, before *Wells, J.*, on May 6, 1871,

*T. H. Sweetser* & *W. S. Gardner* argued in behalf of the petitioner; and *N. St. J. Green*, (by leave of the court,) for other persons in like interest.

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*C. Allen*, Attorney General, for the respondent, contended that the proceedings of the senate, and the warrant upon which the petitioner was held, were justified under the St. of 1871, c. 91,\* entitled "an act for the better discovery of testimony and the protection of witnesses before the joint special committee on the state police," (which was passed March 8, 1871, and took effect upon its passage,) and argued as follows :

The presumption is always strongly in favor of the constitutionality of a statute. *Commonwealth v. People's Savings Bank*, 5 Allen, 428, 431. This statute is the same in substance as the act of congress now in force. See U. S. St. 1862, c. 11; 12 U. S. Sts. at Large, 333; repealing U. S. St. 1857, c. 19; 11 U. S. Sts. at Large, 155. The rules of common law as administered in courts have little bearing on the present question, because the legislature may change those rules. Parliament is said to be omnipotent. But the legislature of Massachusetts has the same power as parliament, except where restrained by our written constitution. *Cooley Const. Limit.* 88, 89. *Thorpe v. Rutland & Burlington Railroad Co.* 27 Verm. 140, 142. The real question therefore is, whether the clause of the Declaration of Rights, that no subject shall be compelled to accuse or furnish evidence against himself, should have so extensive an application as to restrain the

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\* "No person who is called as a witness before the joint special committee on the state police shall be excused from answering any question or from the production of any paper relating to any corrupt practice or improper conduct of the state police, forming the subject of inquiry by such committee, on the ground that the answer to such question or the production of such paper may criminate or tend to criminate himself, or to disgrace him or otherwise render him infamous, or on the ground of privilege; but the testimony of any witness examined before said committee upon the subject aforesaid, or any statement made or paper produced by him upon such an examination, shall not be used as evidence against such witness in any civil or criminal proceeding in any court of justice; provided, however, that no official paper or record produced by such witness on such examination shall be held or taken to be included within the privilege of said evidence so to protect such witness in any civil or criminal proceeding as aforesaid, and that nothing in this act shall be construed to exempt any witness from prosecution and punishment for perjury committed by him in testifying as aforesaid."

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legislature from passing a statute like the present, to aid in the investigation of an alleged wide-spread corruption in the administration of the criminal law.

When the Constitution was adopted, a witness in court was excused from giving answers criminating himself, by the rules of common law ; but a witness before parliament, or a committee of parliament, had no such protection. The rules of common law and of parliamentary law were directly opposed to each other. *Cush. Parl. Law*, §§ 988, 1001. The provision of the Declaration of Rights was designed simply to embody the common law rule, and not to affect the parliamentary law. This is apparent from the history of the rule of common law. The chief feature of the inquisitorial system of investigating crimes, which has been practised where the common law has not prevailed, is the compulsory examination of suspected persons. Actual physical torture, as a method of forcing confessions, has now mostly ceased. But the same principle remains in a mitigated form. The method of the common law has been wholly different ; the judge is not the prosecutor, and the supposed criminal is not required to be the witness. The constitutional provision had reference to these two methods of prosecuting crimes. It meant to say, there must be an accuser, and there must be proof, and a man shall not be compelled to be a witness against himself in criminal prosecutions, or as one step in the judicial investigation of crime. Widely different from this, however, is a legislative investigation of a great public evil. Such an investigation is not for the purpose of punishing any specific crime, but of purifying the public service. There can be no greater evil than a habit of corruption in the administration of the criminal law. If the legislature find need to investigate a charge of such corruption, there is reason for dispensing with the rules applicable to ordinary prosecutions for crimes. The constitutional provision had no reference to such a rare and extraordinary occasion. This is shown by various considerations. All the other provisions of this article in the Declaration of Rights relate only to ordinary prosecutions. The marginal clause is simply, "Prosecutions regulated." No speech, debate, letter or conversation of any of the framers of the Constitution



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is known, which shows an intention to change the existing rule of parliamentary law. That rule, requiring witnesses to testify before parliament even though it might criminate them, had existed in England side by side with the rule of the common law. It may well stand here, side by side with the constitutional provision, which had reference only to prosecutions in the courts of law. See *People v. Kelly*, 24 N. Y. 74, 81-83; 1 Greenl. Ev. (12th ed.) § 451 *a*.

The case was held under advisement, and for conference with the other justices, until May 22, 1871, when the following opinion was read therein :

WELLS, J. The petitioner represents that he is imprisoned and restrained of his liberty, at the state house in Boston, by John Morrissey, sergeant-at-arms of the general court of Massachusetts. Upon return made to the writ, and a hearing of the parties before the court, it appears that the petitioner is held by the respondent under a warrant of commitment, in due form of law, issued by order of the senate, under the hand of the president thereof, requiring the respondent, as sergeant-at-arms of that body, "to commit the said Henry Emery to the common jail of the county of Suffolk, to be there imprisoned for the term of twenty-five days, unless he shall be sooner discharged by the senate, in accordance with the terms of the order" recited in said warrant.

It appears further, from the order recited, that the said Emery, having been summoned to give testimony before a joint special committee of the senate and house of representatives, charged with an investigation affecting the public interests and with authority to require his testimony, and having refused to testify, was arrested and brought to the bar of the senate, pursuant to an order of that body, to answer as for a contempt in so refusing. Being arraigned, the following question was propounded to him : "Are you ready and willing to answer before the joint special committee appointed by this senate and the house of representatives of Massachusetts, to inquire if the state police is guilty of bribery and corruption, the following questions, namely : *First*. Whether, since the appointment of the state constabulary force,

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you have ever been prosecuted for the sale or keeping for sale of intoxicating liquors? *Second.* Have you ever paid any money to any state constable, and do you know of any corrupt practice or improper conduct of the state police? If so, state fully what sums, and to whom, you have thus paid money, and also what you know of such corrupt practice and improper conduct." The cause of commitment, as stated in the order therefor, and as recited in the warrant, is that "the said Emery, in contempt of the authority of this senate, did give an unsatisfactory answer to the second question propounded."

The record of the senate, accompanying the return, sets forth the answer made by said Emery to the questions propounded to him before the senate, and his reason for refusing to answer the second question, as follows: "Intending no disrespect to the honorable senate, I answer, under advice of counsel, that I am ready and willing to answer the first question; but I decline to answer the second question, upon the grounds, *First*, that the answer thereto will accuse me of an indictable offence; *Second*, that the answer thereto will furnish evidence against me, by which I can be convicted of such an offence." It is not contended that this answer was made otherwise than in good faith; nor is it claimed that it was held to be unsatisfactory by the senate for the reason that it was evasive, or that the privilege was set up as a pretext merely. It is apparent that an affirmative answer, to the question put to him, might tend to show that he had been guilty of an offence, either against the laws relating to the keeping and sale of intoxicating liquors, or under the statute for punishing one who shall corruptly attempt to influence an executive officer by the gift or offer of a bribe. Gen. Sta. c. 163, § 7.

The principal questions raised and submitted are: *First.* Whether the constitutional privilege of exemption, relied on, is applicable to investigations ordered and conducted by the legislature or either of its branches. *Second.* Whether, in this case, the petitioner is deprived of the privilege by force of the act "for the better discovery of testimony and the protection of witnesses before the joint special committee on the state police," passed on the eighth day of March 1871. These questions having been

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fully and learnedly argued by counsel upon both sides, it was deemed proper and desirable that the decision and opinion to be given thereon should receive the consideration and sanction of the other members of the court, upon advisement and conference. That conference having been had, the decision and opinion now to be announced bears the approval and unanimous concurrence of all the members of the court.

That any person, held in custody by order of either branch of the legislature, is entitled to have the cause of his imprisonment examined by the supreme judicial court, upon *habeas corpus*, is fully settled by the case of *Burnham v. Morrissey*, 14 Gray, 226. The right of either branch to inquire into an alleged disrespect or contempt of its authority, and to compel the attendance of the party charged therewith, to answer to the charge and await its judgment thereon, is exclusive, and will not be interfered with. How far the judgment of that body is conclusive upon the question whether the facts alleged and proved constitute an offence punishable as a contempt, in a case where the proceedings are correct in form, and no constitutional privilege of the citizen appears to have been infringed ; and how far, and under what conditions, it is open to revision by the court upon *habeas corpus* ; it is not necessary, for the purposes of this case, to consider. The petitioner relies solely upon the privilege of exemption from answering the inquiry put to him, which he claims, under the twelfth article of the Declaration of Rights of the inhabitants of the Commonwealth of Massachusetts. If that is applicable to his case, it is his shield, and he is entitled to be discharged ; otherwise, not.

The provision is this : " No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him ; or be compelled to accuse, or furnish evidence against himself." The whole article has such reference to proceedings for the punishment of criminal offences as to justify the designation in the margin by the two words " Prosecutions regulated." But in that relation, the sentence above quoted from the article plainly presents three distinct aspects. The first branch of the sentence defines the conditions

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upon which alone the subject can be put upon his trial for any offence. The second forbids that he should be compelled to accuse himself. By the narrowest construction, this prohibition extends to all investigations of an inquisitorial nature, instituted for the purpose of discovering crime, or the perpetrators of crime, by putting suspected parties upon their examination in respect thereto, in any manner; although not in the course of any pending prosecution.

But it is not even thus limited. The principle applies equally to any compulsory disclosure of his guilt by the offender himself, whether sought directly as the object of the inquiry, or indirectly and incidentally for the purpose of establishing facts involved in an issue between other parties. If the disclosure thus made would be capable of being used against himself as a confession of crime, or an admission of facts tending to prove the commission of an offence by himself, in any prosecution then pending, or that might be brought against him therefor, such disclosure would be an accusation of himself, within the meaning of the constitutional provision. In the absence of regulation by statute, the protection against such self-accusation is secured by according to the guilty person, when called upon to answer as witness or otherwise, the privilege of then avowing the liability and claiming the exemption; instead of compelling him to answer and then excluding his admissions so obtained, when afterwards offered in evidence against him.

This branch of the constitutional exemption corresponds with the common law maxim, *nemo tenetur seipsum accusare*, the interpretation and application of which has always been in accordance with what has been just stated. Broom Max. (5th ed.) 968. Wingate Max. 486. Rosc. Crim. Ev. (2d Am. ed.) 159. Stark. Ev. (8th Am. ed.) 41, 204, and notes. 1 Greenl. Ev. § 451, and notes.

A like interpretation has been given to a provision in the Constitution of the state of New York, which in terms is more restricted than the one under consideration; to wit, that no person shall "be compelled, in any criminal case, to be a witness against himself." N. Y. Const. of 1846, art. 1, § 6. In the case of

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*People v. Kelly*, 24 N. Y. 74, it was held that this clause protected a witness from being compelled to answer to matters that might tend to criminate himself, when called to testify against another party. And in *People v. Mather*, 4 Wend. 229, this exemption was declared to extend to the disclosure of any fact which might constitute an essential link in a chain of evidence by which guilt might be established, although that fact alone would not indicate any crime.

The third branch of the provision in the Constitution of Massachusetts, "or furnish evidence against himself," must be equally extensive in its application; and, in its interpretation, may be presumed to be intended to add something to the significance of that which precedes. Aside from this consideration, and upon the language of the proposition standing by itself, it is a reasonable construction to hold that it protects a person from being compelled to disclose the circumstances of his offence, the sources from which, or the means by which evidence of its commission, or of his connection with it, may be obtained, or made effectual for his conviction, without using his answers as direct admissions against him. For all practical purposes, such disclosures would have the effect to furnish evidence against the party making them. They might furnish the only means of discovering the names of those who could give evidence concerning the transaction, the instrument by which a crime was perpetrated, or even the *corpus delicti* itself.

Both the reason upon which the rule is founded, and the terms in which it is expressed, forbid that it should be limited to confessions of guilt, or statements which may be proved, in subsequent prosecutions, as admissions of facts sought to be established therein. The question then comes, Do these provisions apply to investigations before a legislative body?

No one will contend, of course, that the legislature is not limited in its powers by the provisions of the Constitution, equally with all other departments of the government and the whole body of the Commonwealth, whether undertaken to be exercised in the ordinary form of laws enacted, or by those orders and requirements which are incidental to its functions and are adopted

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as means of their performance. There is nothing in the terms of the article in question, to except legislative bodies from its operation. The nature and purpose of the provisions are equally applicable to investigations conducted by the legislature itself, or by one of its branches, or by a committee of its own members, as when conducted before the courts, or by commissioners, or other tribunals established by law. Such tribunals can in no case disregard this rule of protection. The legislature cannot, by the most formal and solemn enactments of law, authorize them to do it. If then the legislature cannot, by the formal enactment of all its branches, subject a citizen to such compulsory disclosure, it is difficult to see on what ground of argument or inference, from necessity, propriety, or the nature of constitutional republican government, an authority can be deduced for either branch of the legislature to do so by its mere order.

The protection of the subject is not secured by the Constitution, if it may be so invaded. The range of investigation, which is open to inquiry by the legislature, is unlimited. It is the general court of the Commonwealth; entitled to inquire into the condition and efficiency and mode of operation of all administrative departments of the government of the state, the proper execution of the laws, and all that concerns the public welfare. If other means of discovering offences and convicting offenders are thought to be inefficient or unsatisfactory, investigations by direct authority of the legislature, prompted by public complaints, and intended primarily to furnish information upon which that body may act in remedying abuses in the administration of public affairs, may easily be perverted into an effective means of procuring material to aid in the institution and maintenance of criminal prosecutions. Committees of the legislature, or commissioners acting under its order, to inquire into any supposed failure to enforce the laws, if freed from the restrictions of the Constitution in this particular, may be found useful and efficient as auxiliaries of the grand juries of the Commonwealth. In this way, parties exposed to prosecutions would find their constitutional protection to have failed them. It is the capability of abuse, and not the probability of it, which is to be regarded in judging of the rea-

sons which lie at the foundation, and guide in the interpretation, of such constitutional restrictions.

It is argued by the attorney general, that the article in question is merely the adoption of a rule which prevailed at the common law; that, along with that rule, there always existed in the parliament of England a practice to disregard it in investigations pertaining to the business of that body; and that the rule of legislative investigation remains, unaffected by the constitutional article.

But the rule of the common law did not control parliamentary inquiries, for the simple and obvious reason that the authority of parliament was more potent than the common law, and might change, annul or suspend its restrictions, as that body should determine. The exception is not confined to investigations relating to the business of parliament, but extends to all those in which it authorizes a disregard of the common law rule, before whatever tribunal they are authorized to be conducted. It is because the Constitution of Massachusetts is more potent and above, not only the common law, but the legislature also; controlling all tribunals and all departments of the government alike, as well as all inhabitants of the Commonwealth; that this safeguard of individual rights cannot be suspended or invaded, either by general laws, or the special order of the legislative body, or of any of its branches.

It is to be observed that the provision relates to the privileges of the subject, and not to the authority of any tribunal or body before which inquisition may be made. It places a limit upon all inquiry to which he may be subjected, not by defining the extent of the authority by which it is made, but by surrounding him with a privilege of exemption, which cannot be set aside by any authority without his own consent. It excludes the legislature as well as the courts. It follows, also, that in its exercise it is regulated by the same rules in legislative investigations, as in judicial or other inquiries.

The remaining question arises upon the effect of the statute of March 8, 1871.

It follows from the considerations already named, that, so far as this statute requires a witness, who may be called, to answer questions and produce papers which may tend to criminate himself, and attempts to take from him the constitutional privilege in respect thereto, it must be entirely ineffectual for that purpose, unless it also relieves him from all liabilities, for protection against which the privilege is secured to him by the Constitution. The statute does undertake to secure him against certain of those liabilities, to wit, the use of any disclosures he may make, as admissions or direct evidence against him, in any civil or criminal proceeding.

In a case already referred to, *People v. Kelly*, 24 N. Y. 74, it was held that such a provision, by statute, removed all the liability against which the witness was secured by the constitutional exemption, and that, being thus otherwise furnished with all the protection to which the Constitution entitled him, he had no further occasion, and therefore no right, to set up the claim of privilege, as a protection against that to which he was not exposed. But this decision was made upon the ground that the terms of the provision relied on, in the Constitution of New York, protected the witness only from being compelled "to be a witness against himself," and did not protect him from the indirect and incidental consequences of a disclosure which he might be called upon to make.

The terms of the provision in the Constitution of Massachusetts require a much broader interpretation, as has already been indicated; and no one can be required to forego an appeal to its protection, unless first secured from future liability, and exposure to be prejudiced, in any criminal proceeding against him, as fully and extensively as he would be secured by availing himself of the privilege accorded by the Constitution. Under the interpretation already given, this cannot be accomplished so long as he remains liable to prosecution criminally for any matters or causes in respect of which he shall be examined, or to which his testimony shall relate. It is not done, in direct terms, by the statute in question; it is not contended that the statute is capable of an interpretation which will give it that effect; and it is clear that



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it cannot, and was not intended so to operate. Failing, then, to furnish to the persons to be examined an exemption equivalent to that contained in the Constitution ; or to remove the whole liability against which its provisions were intended to protect them it fails to deprive them of the right to appeal to the privilege therein secured to them.

The result is, that, in appealing to his privilege, as an exemption from the obligation to answer the inquiries put to him, the petitioner was in the exercise of his constitutional right ; and his refusal to answer upon that ground was not, and could not be considered as disorderly conduct, or a contempt of the authority of the body before which he was called to answer. There being no legal ground to authorize the commitment upon which he is held, he must be discharged therefrom. He is

*Discharged accordingly.\**

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\* Pending the consideration of the main question, between the time of the return of the writ and the discharge of the petitioner, he was admitted to bail, and on May 4, 1871, his recognizance taken, with Daniel Chamberlain as surety, in the sum of \$5000, conditioned that he should "personally appear before the justices of the supreme judicial court, to be holden at Boston, within and for the county of Suffolk, on Saturday, the 6th day of May 1871, then and there to answer to such matters and things as shall be objected against him on the behalf of said Commonwealth, and shall do and receive that which by the said court shall be then and there enjoined upon him, and not depart without license." On May 22, 1871, before reading the foregoing opinion, Mr. Justice Wells read the following as his own opinion respecting the admission of the petitioner to bail :

"The case of Henry Emery, petitioner for writ of *habeas corpus*, was heard about two weeks since. At that time it appeared that the investigation before the legislative committee, for which the testimony of the petitioner had been required, was already closed, so that the proceedings were important only for the proper vindication of the lawful authority of the senate. The postponement was therefore ordered for the purpose of further consideration, and a conference with the whole court ; the petitioner meanwhile remaining under bail for his appearance from day to day, until judgment should be given in the case.

"I may premise that bail was allowed to be given without any regard to the question whether the petitioner was entitled to be released finally upon the writ.

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"Admitting a prisoner to bail, as the result of the hearing, and in pursuance of the final judgment in the case, is a proceeding of another and entirely independent character. It is to such allowance of bail only that the provisions of the Gen. Sts. c. 144, § 31, (Rev. Sts. c. 111, § 35,) relate. This is rendered more apparent by referring to the earlier provision in the St. of 1784, c. 72, § 2. Admitting to bail, by means of the writ of *habeas corpus*, in pursuance of these provisions, necessarily implies a legal cause of imprisonment, and a legal warrant or order therefor, from a competent authority, acting within its jurisdiction. Unless these exist, this court cannot hold the party to bail, but must discharge him.

"In the present case, if the petitioner has shown no ground for an absolute discharge, 'law and justice' do not require nor permit that he should be admitted to bail. Such a proceeding would be inappropriate as well as unauthorized. In that event he must be remanded; and as the order of commitment is for a definite period within the constitutional authority of the senate, (Const. of Mass. part 2, c. 1, § 3, art. 11,) his imprisonment for that period will take effect and be measured from the time he is so remanded, although the legislature may have closed its session in the interval.

"Pending the proceedings before the court, upon *habeas corpus*, the custody of the petitioner is, in all cases, and under all circumstances, entirely at the discretion of the court before which the writ is returned. Bail for his appearance from day to day is simply a means by which this custody is maintained. This unrestricted control is necessary to the efficiency and completeness of the remedy, which, by the Constitution, part 2, c. 6, art. 7, is secured to be enjoyed 'in the most free, easy, cheap, expeditious and ample manner.' It is provided in the most explicit terms by the Gen. Sts. c. 144, § 24: 'Until judgment is given, the court or judge may remand the party, or may bail him to appear from day to day, or may commit him to the sheriff of the county, or place him under such other care and custody as the circumstances of the case may require.'

"It is this special authority, and not the general power to admit to bail, that has thus far been exercised in this case."

**CRIMINAL CASES**  
**ARGUED AND DETERMINED**  
**IN THE**  
**SUPREME JUDICIAL COURT**  
**AT THE**  
**MARCH SESSION 1871, IN BOSTON.**

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**PRESENT:**

HON. REUBEN A. CHAPMAN, CHIEF JUSTICE.	
HON. HORACE GRAY, JR.,	
HON. JOHN WELLS,	
HON. JAMES D. COLT,	
HON. SETH AMES,	
HON. MARCUS MORTON,	} JUSTICES.

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**COMMONWEALTH vs. JEROME G. KIDDER & another.**

The Sts. of 1866, c. 285, and 1869, c. 152, do not justify the refining of petroleum at any place where a necessary consequence of the manufacture is the emission of vapors which constitute a nuisance at common law by their unwholesome and offensive nature.

INDICTMENT for a nuisance at common law; averring that on January 1, 1869, in Winthrop, near certain public highways and private dwelling-houses, the defendants set up and maintained certain furnaces, boilers, stills, retorts and other apparatus for refining and preparing for sale and use petroleum and other oils, at their manufactory, and on that day and divers other days between it and the day of the finding of the indictment, which was in March 1870, unlawfully and injuriously caused to be heated and boiled in said boilers and other vessels and apparatus large quantities of petroleum and other oils, and mixed them with other substances, and shook and agitated them in the process of refining and preparing them for sale and use, and

thereby caused to be emitted noisome, offensive and unwholesome substances, smokes, smells and stenches, which then and there filled and impregnated, and continue to fill and impregnate the earth and air, so as to render the earth and air corrupt, offensive, uncomfortable and unwholesome, to the great damage and common nuisance of all the citizens of the Commonwealth there inhabiting, being and residing, and going and returning through the said highways, and against the peace of the Commonwealth. Trial in the superior court in Suffolk, before *Putnam, J.*, who allowed the following bill of exceptions :

“The Commonwealth proved that the defendants had set up furnaces, boilers, stills, retorts and other vessels, with other necessary apparatus, for the purpose of carrying on the business of refining and preparing for sale and use petroleum at their manufactory situate as described in the indictment ; that from January 1, 1869, to the day of the finding of the indictment they had controlled, managed and operated the same ; that on divers days and times between those two days they on said parcel of land heated and boiled in said boilers, stills, retorts and other vessels large quantities of petroleum, and then mixed the same with divers other substances, and shook and agitated the same for the purpose of refining and preparing said petroleum for sale and use ; that by means thereof smokes, smells and stenches were emitted ; and that these smokes, smells and stenches were very disagreeable to travellers passing and repassing on the highways near the factory, rendered many inhabitants of the town of Winthrop uncomfortable, and with some occasioned nausea, soreness of the throat and stricture of the head. Upon this evidence the Commonwealth rested the case, admitting that no oil other than petroleum had been manufactured or refined on the defendants' premises.

“Thereupon the defendants cited the St. of 1866, c. 285, and the St. of 1869, c. 152, and requested the judge to rule that no sufficient case had been made against them, and to instruct the jury to return a verdict of not guilty. This the judge declined to do ; and ruled that neither of the statutes afforded any protection to the defendants against this indictment.

"The defendants then proved that it was impossible, during the time covered by the indictment, to manufacture and refine petroleum without throwing off disagreeable smokes and odors. And they offered further to prove that, during the time covered by the indictment, there had been used in their factory no other means and processes than were used in all the other like establishments throughout the Commonwealth at the times when said statutes were passed; that, during the time, they had manufactured crude petroleum and kept and stored its products in distant and properly ventilated buildings, specially adapted to the purpose, and surrounded by an embankment constructed so as effectually to prevent the overflow of the petroleum or any of its products beyond the premises on which the same were kept, manufactured or refined; that said buildings were occupied in no part as a dwelling; and that the building nearest to said premises was more than fifty feet distant therefrom.

"The judge ruled, for the purpose of the trial, that none of this offered evidence was admissible for the purpose of bringing this factory within the protection of the statute, for which purpose alone it was offered. The defendants introduced no other evidence; a verdict of guilty was thereupon returned; and the defendants alleged exceptions to the foregoing rulings and refusals to rule."

*H. W. Paine & B. F. Brooks*, for the defendants. 1. Conceding, for the purposes of the argument upon this point, that the evidence shows a nuisance at common law, the question is, whether the defendants were to any extent protected in their business by the two statutes which they cited. If they were, and they did anything in excess of their protection, it would constitute another and different offence. *Call v. Allen*, 1 Allen, 137, 141, 143. *Commonwealth v. Odin*, 23 Pick. 275, 279. *State v. Godfrey*, 24 Maine, 232.

2. The St. of 1866, c. 285, § 1, reenacted in the St. of 1869, c. 152, § 5, is a legislative license to the defendants to refine petroleum on certain conditions. The indictment does not aver, and there was no offer on the part of the Commonwealth to prove, that the conditions were not complied with. On the con

trary, the evidence introduced or offered by the defendants shows a literal compliance with them, and that the disagreeable smokes and smells were an inevitable result of the manufacture. Legislative authority is a license. *Leigh v. Westervelt*, 2 Duer, 618. *First Baptist Church v. Utica & Schenectady Railroad Co.* 6 Barb. 313, 318. *Harris v. Thompson*, 9 Barb. 350, 364. *Williams v. New York Central Railroad Co.* 18 Barb. 222, 247. If the statutes were a license to any extent, and it was not needful for the Commonwealth to aver or prove wherein the license was exceeded, it was clearly competent for the defendants to prove that they had not exceeded it.

3. But the intent and effect of the statutes was, to take the refining of petroleum out of the category of nuisances at common law, and at the same time invest municipal officers with powers to regulate the authorized processes of manufacture. St. 1866, c. 285, §§ 1-3. St. 1869, c. 152, §§ 5, 6, 9. *Commonwealth v. Cooley*, 10 Pick. 37. *Commonwealth v. Marshall*, 11 Pick. 350. *Jennings v. Commonwealth*, 17 Pick. 80.

C. Allen, Attorney General, for the Commonwealth, besides some of the authorities referred to by the defendants and in the opinion, cited Gen. Sts. c. 26, §§ 52-60; c. 88, § 51; *Rex v. White*, 1 Burr. 333; *State v. Haines*, 30 Maine, 65; *State v. Hart*, 34 Maine, 36; *Commonwealth v. Brown*, 13 Met. 365; *Wesson v. Washburn Iron Co.* 13 Allen, 95, 104; *State v. Mullikin*, 8 Blackf. 260; *United States v. Elder*, 4 Cranch C. C. 507, 508; *Commonwealth v. McDonough*, 13 Allen, 581, 584; *Rex v. Cross*, 2 C. & P. 45½; *Luning v. State*, 1 Chandler (Wisc.) 178, 185, 186; *Ryan v. Copes*, 11 Rich. 217, 237, 238; *Rex v. Crunden*, 2 Camp. 89; *Springfield v. Connecticut River Railroad Co.* 4 Cush. 63, 69-74; *Salem v. Eastern Railroad Co.* 98 Mass. 431, 442; *Stoughton v. State*, 5 Wisc. 291.

GRAY, J. The only ground of defence, upon which the defendants rely, is that they are protected against this indictment by the Sts. of 1866, c. 285, and 1869, c. 152. In order to ascertain the intention of the legislature in enacting these statutes, it is important to take into consideration not only the provisions of the statutes themselves, but also the law as it stood before their pas-

sage, and the rule that statutes in derogation of the common law are to be construed strictly.

A nuisance at common law may consist in the keeping or manufacture of gunpowder, naphtha, or other explosive or inflammable substances in such quantities and places or in such a manner as to be dangerous to the persons and property of the inhabitants of the neighborhood. *People v. Sands*, 1 Johns. 78. *Cheatham v. Shearon*, 1 Swan (Tenn.) 213. *Regina v. Lister*, Dearsly & Bell, 209. It may also consist in the carrying on of any trade or business in such a manner as to emit offensive odors and stenches, either injurious to the health of the public, or making the occupation of neighboring dwelling-houses uncomfortable and disagreeable. *Eames v. New England Worsted Co.* 11 Met. 570. *Commonwealth v. Upton*, 6 Gray, 473. *Commonwealth v. Rumford Chemical Works*, 16 Gray, 231. *Bamford v. Turnley*, 3 B. & S. 62.

The St. of 1865, c. 244, imposed a penalty of \$1000 on any one who should store or keep petroleum or naphtha in a greater quantity than five hundred gallons in one locality without license from the mayor and aldermen or selectmen ; and authorized city councils and selectmen to adopt such rules and regulations as they might deem reasonable in relation to the storage, keeping and sale thereof within the limits of their municipalities.

The St. of 1866, c. 285, § 1, is as follows : " Crude petroleum, or any of its products, may be stored, kept, manufactured or refined, in detached and properly ventilated buildings specially adapted to the purpose, and surrounded by an embankment so constructed as to effectually prevent the overflow of said petroleum or any of its products beyond the premises on which the same may be kept, manufactured or refined ; said buildings to be occupied in no part as a dwelling, and if less than fifty feet from any other building must be separated therefrom by a stone or brick wall at least ten feet high and sixteen inches thick." Section 2 imposed a penalty of \$500 on any one who should manufacture, refine, mix, store or keep any oil or fluid, composed wholly or in part of any of the products of petroleum, in a greater quantity than five hundred gallons in any one locality, except as provided in § 1, without a license from the mayor and aldermen or

selectmen, to continue in force not more than one year and revocable at their pleasure. Section 3 authorized city councils and selectmen to adopt such rules and regulations as they might deem reasonable, not inconsistent with the provisions of that act, in relation to the manufacture, mixing, storing, keeping and selling of any of said products. And § 4 repealed the St. of 1865.

The St. of 1869, c. 152, § 5, reënacted the St. of 1866, c. 285, § 1, with the single difference of substituting twelve for sixteen inches in the thickness of the wall required. Sections 6 and 9 of the St. of 1869 do not materially differ from §§ 2 and 3 of the St. of 1866. The other sections of the St. of 1869 relate only to the inspection, storing, selling, mixing for sale, and offering for sale, of such products.

These enactments are manifestly intended to protect the public against the dangers arising from the explosive and inflammable nature of petroleum ; and, having regulated the whole subject in that aspect, they might well be deemed to protect any establishment, guarded as they direct, from indictment as a nuisance on account of such dangers only. But they contain no provisions for preventing the spread of unwholesome and offensive odors in the course of the manufacture ; and if the defendants' position were sustained, the result would be that no limit would be put to such manufacture in the most crowded and populous portions of any town or city. The reasonable, if not the necessary, inference is, that it was not the intention of the legislature to establish a new rule in this regard, but to leave the question whether the manufacture is carried on at such places and in such a manner as to be unwholesome and offensive to the public, and on that account indictable as a nuisance, to be determined by the rules of the common law.

*Exceptions overruled.*



## COMMONWEALTH vs. ELISHA W. HAYNES, JR.

## ELISHA W. HAYNES, JR. vs. COMMONWEALTH.

At the trial of an indictment on the St. of 1868, c. 263, for selling adulterated milk, there was evidence that the defendant, (who was a son of the owner of a milk route,) with a companion who was in the same employment with himself, knowingly adulterated milk on its way for distribution to his father's customers, and then, having charge, with his companion, of its distribution from the wagon on which it was conveyed upon the route, caused a can of it to be delivered to one of the customers by the hand of his companion. *Held*, that he had no ground of exception to instructions to the jury, that, in the absence of proof of any previous contract to supply milk to the customer, the delivery might be deemed an act of sale; nor to an instruction framed on a supposition that the jury might find that he was in the employment of his father, although there was no averment in the indictment to that effect.

The provision of the St. of 1868, c. 263, § 2, that the penalties prescribed by § 1 for knowingly selling adulterated milk may be recovered on complaint before any court of competent jurisdiction, and one half of the fine imposed go to the complainant or informer, does not exclude the superior court from jurisdiction of an indictment for the offence.

A defendant in a criminal case, who obtains by writ of error a reversal of the judgment against him and is thereupon sentenced to a lesser punishment under the Gen. Sts. c. 146, § 16, is entitled to costs under § 17.

INDICTMENT on the St. of 1868, c. 263,\* found and returned into the superior court in Suffolk at August term 1868, for selling

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\* The first three sections of the St. of 1868, c. 263, are as follows:

"SECTION 1. Whoever sells or exchanges, or has in his possession, with intent to sell or exchange, or offers for sale or exchange, adulterated milk, or milk to which water or any foreign substance has been added, knowing the same to be adulterated or to contain water or any foreign substance, shall, for the first offence, be punished by a fine of one hundred dollars, and, for any subsequent violation, a fine not less than one hundred dollars, nor exceeding three hundred dollars, and imprisonment in the house of correction not less than thirty nor more than ninety days.

"SECTION 2. The penalties provided in the preceding section, and those provided in the act to which this is in addition, [St. 1864, c. 122,] may be recovered on complaint before any court of competent jurisdiction; and one half of the amount of fine imposed shall go to the complainant or informer, and the remainder to the treasurer of the city or town where the offence was committed.

"SECTION 3. It shall be the duty of every inspector of milk to institute complaint on the information of any person who may lay before him satisfactory evidence on which to sustain the same, and he shall be entitled to receive one half the amount of any penalty recovered therefor, and shall pay over the same to the person who has first given him the information on which the complaint was made."

nine quarts of milk adulterated with water to Mary Cogan at Boston on July 29, 1868.

At the trial, before *Lord, J.*, it appeared "that the defendant did not, and his father did, own a milk route, and carry milk" from Sudbury to Boston, "to his customers in the county of Suffolk," that Mary Cogan was one of the said customers in Boston, and had notice, some two years before July 1868, "that the father owned the milk route and carried on the business, and that the defendant did not;" that on the night of July 28, 1868, while the milk designed for distribution the next day to said customers in Boston was at Cambridge on its way from Sudbury to Boston, the defendant and Aquarius Breen, who was in the same employment with the defendant, knowingly adulterated it with water; "that on July 29 the cans of adulterated milk were conveyed by wagon, by the defendant, to Boston, Breen going with and assisting the defendant; that the wagon was stopped at the corner of a street in Boston, and the defendant took one of the cans of adulterated milk from the wagon and handed it to Breen to deliver to Mary Cogan, and Breen went some distance down one street and then did deliver said can of adulterated milk to her, and the defendant at the same time took another can of the adulterated milk to deliver to another of said customers, (one of them going through one street and the other another,) and went down another street, not in sight of Breen, and they then joined and resumed their work of delivery in other parts of the city; and that the father was not present."

"There was no evidence of any contract upon which the milk was furnished; and the judge ruled that, there being no evidence of any contract of sale, each delivery might be deemed an act of sale, and that, if the defendant and Breen made the delivery, they would be responsible severally as well as jointly, and this, whether the sale was then made by them either as principals or as agents, and that the mode of delivery was such as to authorize the jury to find it to be the joint act of the defendant and Breen.

"The judge also ruled, and instructed the jury, that if the defendant was in the employ of his father, who owned the milk and milk route and carried on the business, and the defendant and

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Commonwealth v. Haynes.

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Breen, well knowing the milk to have been adulterated by the addition of water thereto, took charge of the wagon, and upon it brought the adulterated milk to Boston to distribute to said customers there, and the defendant gave the can of adulterated milk to Mary Cogan at the time charged in the indictment, then there was evidence of a sale by the defendant to Mary Cogan of adulterated milk knowing it to be adulterated, and the jury would be authorized in finding the defendant guilty."

The jury returned a verdict of guilty; and the defendant alleged exceptions.

*F. F. Heard*, for the defendant. 1. The first instruction to the jury, that "each delivery might be deemed an act of sale," was erroneous. *Commonwealth v. Williams*, 6 Gray, 1.

2. This is a statute offence, and must be strictly pleaded. St. 1864, c. 122, § 4. St. 1868, c. 268. There is no averment that the defendant was in the employment of his father; and therefore the second instruction was inapplicable and erroneous.

*C. Allen*, Attorney General, for the Commonwealth.

WELLS, J. The first instruction appears to have been applied to the absence of proof that there was any previous contract for supplying milk to Mary Cogan, or any express contract of sale at the time of delivery. The instruction, that a delivery of milk by a dealer to a customer might be deemed an act of sale, was correct, and proper to be given.

The instruction was also correct that both parties engaged in the distribution of milk from the same wagon, and coöperating therein, knowing it to be adulterated, were severally liable, as well as jointly.

The act of sale is the same, and the offence the same, whether the defendant sold for himself or for another.

*Exceptions overruled.*

At April term 1871 of the superior court, after this decision, the defendant filed a motion to arrest the judgment for want of jurisdiction of the offence, and *Dewey, J.*, by his request, reported the question for the determination of this court, before whom it was argued in November 1871.

*Heard*, for the defendant. By the St. of 1868, c. 263, § 2, the superior court had not original, but only an appellate jurisdiction. The term "complaint" is technical, descriptive of proceedings before magistrates. Shaw, C. J., in *Commonwealth v. Davis*, 11 Pick. 432, 436. See also *Rex v. Robinson*, 2 Burr. 799, 805; *Commonwealth v. Howes*, 15 Pick. 231, 233; *The King v. Carlile*, 3 B. & Ald. 163; *Rex v. Buck*, 2 Stra. 679; 1 Russell on Crimes (4th ed.) 88; Purcell Crim. Pl. 4. The mention of other methods of proceeding impliedly excludes that by indictment 2 Hawk. c. 25, § 4.

C. Allen, Attorney General, for the Commonwealth, cited Gen. Sts. c. 114, § 6; c. 176, § 2; *Colburn v. Swett*, 1 Met. 232, 235; *Taunton v. Sproat*, 2 Gray, 428; *Commonwealth v. Hudson*, 11 Gray, 64, 66.

CHAPMAN, C. J. This is an indictment under the St. of 1868, c. 263, § 1, for selling adulterated milk, knowing the same to be adulterated. The penalty for the first offence is \$100. By § 2, the penalty may be recovered on complaint before any court of competent jurisdiction. The defendant contends that the word "complaint" is technical; and that the language of the statute is exclusive, and does not authorize an indictment. But the usual import of the term "may," as used in the statute, is permissive, and not exclusive; and the whole legislation on the subject shows it to be so in this case. By the Gen. Sts. c. 114, § 6, the superior court has jurisdiction of all crimes, offences and misdemeanors. By c. 176, § 2, when the fine does not exceed \$100, police courts have jurisdiction concurrently with the superior court. The method of prosecution in the superior court is by indictment, and not by complaint; but in the police court it is by complaint; and the words "may be recovered on complaint before any court of competent jurisdiction, and one half of the amount of fine imposed shall go to the complainant or informer," are used here with reference to the appropriation of the fine in cases where there is a complainant, and not for the purpose of excluding the jurisdiction of the superior court in cases where no person desires to obtain a part of the fine. We think the superior court has jurisdiction to proceed by indictment. *Motion overruled.*

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*Haynes v. Commonwealth.*

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Judgment and sentence to pay a fine of \$300 were then rendered by the superior court against the defendant, who thereupon sued out a

WRIT OF ERROR to reverse the judgment for the reason that the indictment did not aver any previous violation of the statute by him and therefore no other punishment than a fine of \$100 was warranted by its provisions. The judgment was reversed, with the consent of the attorney general, and judgment and sentence for a fine of \$100 were rendered in this court under the Gen. Sts. c. 146, § 16, which provide that, "when a final judgment in a criminal case is reversed by the supreme judicial court on account of error in the sentence, the court may render such judgment therein as should have been rendered, or may remand the case for that purpose to the court before which the conviction was had."

The plaintiff in error moved for costs, under § 17, which provides that "if the defendant in a criminal case is discharged on a writ of error, the legal costs shall be borne by the Commonwealth;" and the motion was argued in March 1872.

*Heard*, for the plaintiff in error.

*C. R. Train*, Attorney General, for the Commonwealth.

GRAY, J. The provision, now incorporated into the Gen. Sts. c. 146, § 17, that if the defendant in a criminal case is discharged upon a writ of error the legal costs shall be borne by the Commonwealth, was first enacted by St. 1842, c. 54, § 3. At that time, upon the reversal of a judgment in error for excess in the sentence, the only judgment which could be given was for the discharge of the prisoner. *Shepherd v. Commonwealth*, 2 Met. 419 *Britton v. Commonwealth*, 1 Cush. 302. The subsequent enactment of St. 1851, c. 87, repeated in the Gen. Sts. c. 146, § 16, authorizing this court, upon reversing a judgment for error in the sentence, to render such judgment as should have been rendered, or to remit the case for that purpose to the court before which the conviction was had, cannot be construed to deprive a party of his costs, who has prevailed upon the writ of error, and in effect obtained his discharge from the original judgment, although he is sentenced anew to a lesser punishment.

*Judgment for costs against the Commonwealth*

## COMMONWEALTH vs. ALBERT MORGAN &amp; another.

On the trial of an indictment for a libel, evidence is admissible to show that the words "State Cop." in the libellous writing mean a deputy of the constable of the Commonwealth.

If a criminal prosecution for a libel, where the defendant does not, under the Gen. Sta. c. 172, § 11, justify the libel as true, he cannot introduce evidence that the person libelled treated part of the libellous matter as a joke originated by himself.

The publisher of a newspaper in which a libel appears is *prima facie* presumed to have published the libel; the presumption is not rebutted by evidence that he never saw the libel and was not aware of its publication until it was pointed out to him, and that an apology and retraction were afterwards published in the same newspaper; and the exclusion of such evidence at his trial on an indictment for the libel gives him no ground of exception.

If the defendant in an indictment for a libel offers himself as a witness on the trial, he cannot refuse to answer, on cross-examination, whether he was the publisher of the newspaper in which the libel appeared, although he was examined in chief only as to his knowledge of the publication of the libel.

On the trial of an indictment for publishing a libel in a newspaper printed and published by two persons, proof that the newspaper was printed and published by only one of them is not a material variance, since the St. of 1864, c. 250, § 1, if the identity of the newspaper is evident and it is described so as to prevent any prejudice to the defendant.

At the trial of an indictment for publishing a libel in a newspaper at a certain time and place, the production of a copy of the newspaper containing the libel, bearing date of a day within the statute of limitations, together with evidence that it was purchased at a newspaper-stand in said place, is sufficient evidence of the time and place of publication.

A verdict on an indictment for composing, writing, printing and publishing a libel, that the defendant is "guilty of publishing as alleged in the indictment, and not guilty as to the residue," is equivalent to a general verdict of guilty.

INDICTMENT, in Suffolk, against Albert Morgan and James N. Smart, alleging that they "did unlawfully and maliciously compose, write, print and publish, and cause to be composed, written, printed and published in a certain newspaper, printed and published at Boston in said county of Suffolk by said Morgan and Smart, to wit, the Saturday Evening Express," two libels against Chauncey C. Dean, the first at Boston on September 11, 1870, and the second at Boston on September 18, 1870. The indictment set forth the libels, which charged "State Cop. Dean" with having acted, while a soldier in the army, in a manner to indicate cowardice, and with having been drunk while on duty as a deputy of the constable of the Commonwealth. The district attorney entered a *nolle prosequi* as to Smart. In the superior court, before the jury were empanelled, the other defendant

moved to quash the indictment on grounds that are now immaterial ; and the motion was overruled.

At the trial at October term 1870, before *Devens, J.*, Dean being called as a witness, was asked what was meant by "State Cop." The defendant objected ; whereupon the district attorney stated " that it was a slang word, not to be found in the ordinary dictionaries of the language." The judge overruled the objection, and the witness answered that "State Cop." meant "a deputy state constable of the Commonwealth."

The defendant offered the testimony of several witnesses, that before and since the alleged publication Dean had frequently spoken of those matters concerning his conduct in the army which were charged in the libel, "and treated and considered it a joke ; and that in fact the rumor was originated by himself in conversations had with the witnesses and others ;" but the judge excluded the evidence.

The defendant also offered evidence tending to show that he never saw the libel of September 18, or was aware of its publication, until it was pointed out to him by a third person, and that an apology for and retraction of the statements therein contained was subsequently published in the *Saturday Evening Express* ; but the judge excluded the evidence as immaterial.

A witness testified that the defendant told him, "about a year ago," that he was then the publisher of the *Saturday Evening Express* ; and Smart testified that "seven or eight years ago" the defendant came to him and asked him what he would do the press-work of the *Saturday Evening Express* for ; that since that time he had done the press-work for that paper ; that he had no interest in the paper ; that he made out his bills to the *Saturday Evening Express* ; that sometimes the defendant paid him, and sometimes a boy paid him ; and that he did not know who was the publisher of the paper when the libels appeared. The defendant was then called by his counsel as a witness, for the purpose of showing that he had never seen the libels until they were pointed out to him, and was asked on cross-examination whether he was not the publisher of the *Saturday Evening Express*. He objected to answering, on the ground that his answer might crim-

inate him; but the judge overruled the objection, and he answered that he was the sole publisher, and that the paper was not published by himself and Smart.

The defendant asked for a ruling that, if the paper was printed and published by himself only, there was a variance but the judge declined so to rule.

Dean testified that he bought copies of the Saturday Evening Express containing the libels at newspaper-stands in Boston, and these copies were put in evidence. One of them was dated on the first page, Saturday, September 10, and the other Saturday, September 17; but on the third page of each were two columns headed "Sunday Morning, September 11," and "Sunday Morning, September 18," respectively, and it was in these two columns that the libels were printed.

The defendant requested a ruling that this evidence as to publication would not support the indictment; but the judge declined so to rule, and ruled "that it was not necessary to prove the day when published, provided the publication was within the statute of limitations, and the proof that the papers were purchased at the time testified to by Dean was sufficient evidence."

The jury returned a verdict of "Guilty as to publishing, but not guilty as to the rest;" and the clerk affirmed and recorded the verdict in the following form: "Guilty of publishing as alleged in the indictment, and not guilty as to the residue." After verdict the defendant moved in arrest of judgment, on the ground "that he had not been convicted of any offence at law," but the motion was overruled; and he alleged exceptions.

*J. W. Mahan*, for the defendant.

*C. Allen*, Attorney General, for the Commonwealth.

COLT, J. 1. The questions raised upon the motion to quash are not insisted upon in the defendant's argument, and need no consideration.

2. The Commonwealth must prove the application of the words used to the person against whom the libel is directed; and the meaning of the defendant in the language used, when it is ambiguous or consists of expressions not in common use, but having a known meaning among certain persons, may be explained by



those who know their application. 2 Phil. Ev. (4th Am. ed.) 718, 734 note.

3. The defendant was properly not permitted to show that the person libelled, in conversation with the witnesses, treated some of the matter charged in the libel as a joke originated by himself. In a criminal prosecution for libel, it is not material to inquire whether the person attacked has actually suffered from injured feelings. The public scandal and the injury to public morals remain, however lightly he may have treated it. Nor was it material to show that he originated the rumor. The defendant did not offer to give in evidence the truth of the charge in the libel, under the Gen. Sts. c. 172, § 11; and this evidence could only have been competent under such an offer, as in the nature of an admission. And besides, this offer at best only reached a small portion of the libellous matter published.

4. The defendant then offered to prove that he had never seen the alleged libel, and was not aware of its publication till it was pointed out to him by a third party; and that an apology and retraction was subsequently published in the same newspaper.

When a libel is sold in a bookseller's shop, by a servant of the bookseller, in the ordinary course of his employment; or is published in a newspaper; the fact alone is sufficient evidence to charge the bookseller, or the proprietor of the newspaper, with the guilt of its publication. This evidence, by the earlier English decisions, was held not to be conclusive, but the defendant was permitted to show, in exculpation, that he was not privy, nor assenting to, nor encouraging, the publication. See 1 Lead. Crim. Cas. 145; notes to *Rex v. Almon*, 5 Burr. 2686. Afterwards, such evidence was held conclusive, upon the ground that it was necessary to prevent the escape of the real offender behind an irresponsible party. *Rex v. Gutch*, Mood. & Malk. 433. *Rex v. Walter*, 3 Esp. 21. In both these cases, the defendants offered to show that they were perfectly innocent of any share in the criminal publication, and that, although proprietors of the papers, they were living at a distance from London, the place of publication, taking no share in the actual publication, and in one case confined by illness when the paper complained of appeared. It

was ruled by Lord Kenyon and Lord Tenterden to be no defence. But now, by a recent English statute, a defendant is permitted to prove that such publication was made without his authority, consent or knowledge, and did not arise from want of due care or caution on his part. St. 6 & 7 Vict. c. 96.

The rule thus made positive law is in strict accordance with those just principles which ought to limit criminal liability for the acts of another, and which have been recognized in the decisions of this court. Criminal responsibility on the part of the principal, for the act of his agent or servant in the course of his employment, implies some degree of moral guilt or delinquency, manifested either by direct participation in or assent to the act, or by want of proper care and oversight, or other negligence in reference to the business which he has thus intrusted to another. The rule of civil liability is broader, and the principal must respond in damages for the default or tortious act of the agent or servant in his employment, although he had no knowledge of it, or had actually forbidden it in advance and exercised due care to prevent it.

In *Commonwealth v. Nichols*, 10 Met. 259, it was held that a shopkeeper is criminally liable for an unlawful sale of spirituous liquor in his shop, made with his assent by a servant or agent employed in his business. But such sale is only *prima facie* evidence of assent. And it was said that "if a sale of liquor is made by the servant without the knowledge of the master, and really in opposition to his will, and in no way participated in, approved or countenanced by him, and this is clearly shown by the master, he ought to be acquitted." It is to be remarked with reference to this case, that the question whether the sale was really against the defendant's will is for the jury upon all the evidence, and that the facts that the profits of the business were received by the defendant, and that there was an absence of proper precautions to prevent the illegal traffic, would justify an inference of his approval.

In *The King v. Dixon*, 3 M. & S. 11, the defendant was convicted of selling unwholesome bread, upon proof that his foreman had by mistake put too much alum in it. There was no evidence

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*Commonwealth v. Morgan.*

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that the master knew of the quantity used in this instance. But Bayley, J., said: "If a person employed a servant to use alum, or any other ingredient, the unrestricted use of which was noxious, and did not restrain him in the use of it, such person would be answerable if the servant used it to excess, because he did not apply the proper precaution against its misuse."

It is the duty of the proprietor of a public paper, which may be used for the publication of improper communications, to use reasonable caution in the conduct of his business, that no libels be published. He is civilly responsible for the wrong, to the extent indicated; and he is criminally liable, unless the unlawful publication was made under such circumstances as to negative any presumption of privity, or connivance, or want of ordinary precaution on his part to prevent it. 3 Greenl. Ev. §§ 170, 178.

We are of opinion that the offer of the defendant did not go far enough, in view of the law thus stated, to rebut the presumption of guilt arising from the publication of this libel. The facts offered may be true, and yet entirely consistent with the fact that the conduct of the newspaper was under his actual direction and charge, at a time when he was neither absent from home nor confined by sickness, and when his want of knowledge would necessarily imply criminal neglect to exercise proper care and supervision over the subordinates in his employ. It is consistent also with such information in this instance, in regard to the proposed libellous attack, as should have put him on inquiry; and with the fact that the general management of the paper was of such a character as to justify the inference that the defendant approved of or connived at publications of this description, and had given his general assent to them. Under such circumstances, the defendant ought not to be permitted to escape on the plea that he had not seen the particular article and did not know of its publication.

As to the evidence offered of a subsequent apology and retraction, the answer is that it is only a matter in mitigation of sentence. The crime is not purged by it.

5. The evidence to show that the defendant was the publisher was sufficient without the testimony of the defendant, who offered

himself as a witness and was sworn. His testimony on cross-examination was admissible, although it tended to criminate himself. By taking the stand as a witness, he waived his constitutional privilege of refusing to furnish evidence against himself, and subjected himself to be treated as a witness. St. 1866, c. 260. *Commonwealth v. Mullen*, 97 Mass. 545. *Commonwealth v. Bonner*, Ib. 587. Under our rule, the cross-examination of a witness is not confined to the matters inquired of in chief. *Moody v. Rowell*, 17 Pick. 490, 498.

6. If the allegation in the indictment, that the libel was published in a newspaper printed and published by the two persons named, is to be regarded as a matter of essential description, and as equivalent in common acceptation to an allegation that the two were proprietors of the paper, then, although a purely redundant allegation, it would formerly have been necessary to prove it as alleged. *Commonwealth v. Varney*, 10 Cush. 402. Now by the St. of 1864, c. 250, § 1, no variance between the writing and the paper produced in evidence is material, if the identity of the instrument is evident, and it is described so as to prevent all prejudice to the defendant. *Commonwealth v. Hall*, 97 Mass. 570.

7. The other rulings at the trial do not appear to be erroneous.

8. The verdict of the jury was equivalent, as matter of law, to a general verdict of guilty. It was the same as a finding that the defendant was guilty of the publication of the libel, as charged in the indictment. And although the charge is that the defendant composed, wrote, printed and published the alleged libel, yet it is well settled that it is supported by proof of publication alone. 3 Greenl. Ev. § 169. The motion in arrest of judgment was rightly overruled. *Exceptions overruled.*

## COMMONWEALTH vs. JAMES J. DACEY &amp; others.

A conviction may be had on an indictment, although it appears at the trial that the crime was not committed on the day alleged therein, and it is not proved on what day it was committed, if it is proved to have been committed before the finding of the indictment and five or six weeks before the trial.

INDICTMENT found at January term 1871 of the superior court in Suffolk, for a robbery alleged to have been committed on December 3, 1870.

At the trial, before *Putnam*, J., in January 1871, the evidence failed to show precisely on what day the crime was committed, but it appeared that it was "five or six weeks" before the trial and before the finding of the indictment; and it was admitted that it could not have been committed on the day charged.

The defendants requested the judge to instruct the jury "that the Commonwealth must fix the day of the month on which the alleged offence was committed, by the indictment and the evidence, or by one or the other, and as it was admitted that the offence could not have been committed on December 3, and there was no other date fixed by the evidence, they could not convict the defendants."

The judge declined so to instruct the jury; and instructed them "that the Commonwealth was not bound by the day named in the indictment; that if the jury were satisfied, beyond a reasonable doubt, that the offence was committed by the defendants at some time before the finding of the indictment and within the time named by the witnesses, they might find the defendants guilty, although they were unable to settle in their own minds on what precise day of the month it was committed."

The jury returned a verdict of guilty against all the defendants, and they alleged exceptions.

*J. H. Butler*, for the defendants.

*C. Allen*, Attorney General, for the Commonwealth.

BY THE COURT. It was not necessary to prove the precise day on which the crime was committed.

*Exceptions overruled.*

## COMMONWEALTH vs. JOHN LEE.

An indictment for attempting forcibly to rescue a prisoner, held in the lawful custody of a police officer on a charge of breaking and entering a dwelling-house with intent to steal therein, is not defective for omitting to state the process on which the prisoner was held in custody, and the nature and circumstances of the holding; and proof that the officer arrested him in the dwelling-house on a charge of breaking and entering it and stealing therein is not a variance.

CHAPMAN, C. J. The indictment alleges that the defendant attempted forcibly to rescue Richard Burke, "a prisoner held in the lawful custody of" Ransom F. Clayton, a police officer, on a charge "of the offence of breaking and entering the dwelling-house of one Richard Nagle with intent to steal therein;" and that in such attempt the defendant "did take hold of said Burke." The defendant objected that the charge was insufficiently set forth, as the process was not stated by which Burke was held in custody, nor the nature and circumstances of such holding. The officer had arrested Burke in the house of Richard Nagle, in consequence of information given him by Nagle, on the charge of breaking and entering Nagle's dwelling-house, and stealing therein. The offence was a felony; Gen. Sts. c. 161, § 13; and the arrest might be lawfully made without a warrant. *Rohan v. Sawin*, 5 Cush. 281. It could not be necessary to set forth in the indictment the process by which he was held or the manner or circumstances of the holding. The fact that he was held in custody under a lawful arrest was the essential matter to be proved.

The court ruled correctly that there was no variance between the proof and the allegations. *Exceptions overruled.*

C. H. Hudson & E. W. Sanborn, for the defendant.

C. Allen, Attorney General, for the Commonwealth.

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Commonwealth v. O'Brien.

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COMMONWEALTH vs. JOHN O'BRIEN & others.

An indictment with a single count charging an assault upon two at the same time is good, and may be supported by proof of an assault upon one only.

INDICTMENT, in Middlesex, with a single count, alleging that the defendants on October 2, 1870, at Lexington, "in and upon Alonzo L. Tuttle and Luke Tuttle did make an assault, and the said Alonzo L. and Luke did then and there beat, bruise, wound and ill treat, and other wrongs to the said Alonzo L. and Luke then and there did, against the peace," &c.

At the trial in the superior court, before *Scudder*, J., there was evidence tending to show that only one of the Tuttle's was assaulted; and the defendants prayed for a ruling that if the assault was on one only of the Tuttle's the jury must acquit the defendants. But the judge declined so to rule; the jury found the defendants guilty; and they alleged exceptions.

*R. Stone, Jr.*, for the defendants, cited *State v. McClintock*, 8 Iowa, 203; *Kenney v. State*, 5 R. I. 385.

*J. C. Davis*, Assistant Attorney General, (*C. Allen*, Attorney General, with him,) for the Commonwealth.

GRAY, J. It is now well settled, though it was once held otherwise, that a man who assaults two persons at the same time may be charged in a single count with the assault upon both as one breach of the peace. *Rex v. Benfield*, 2 Burr. 980, 983, 984. *Anon. Lofft*, 271. *Regina v. Giddins*, Car. & M. 634. *Commonwealth v. McLaughlin*, 12 Cush. 615.

The indictment therefore duly charging an assault upon Alonzo and upon Luke, a conviction thereon is supported by proof of an assault upon either, within the elementary and universal principle of criminal law, that it is enough to prove so much of the indictment as shows that the defendant has committed a substantive crime therein specified, although he is not shown to have been guilty of all that is charged against him. *Commonwealth v. Griffin*, 21 Pick. 523. *Commonwealth v. Livermore*, 4 Gray, 18. *Jennings v. Commonwealth*, 105 Mass. 586. *Rex v. Carson*, Russ. & Ry. 308.

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Commonwealth v. Chamberlain.

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It was argued that this was like the case of an indictment for larceny of goods of A. and B., which would not be supported by proof of stealing the goods of A. only. But that is because such an indictment does not charge a theft of the property of A. and the property of B., but only of the joint property of both. The present case is more analogous to that of an indictment for the larceny of the goods of A. and the goods of B., which is supported by proof of stealing the goods of either. In this case, as in that, the substance of the crime charged is fully proved, although it is not shown to have affected so many persons as it is alleged to have done.

*Exceptions overruled.*

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COMMONWEALTH vs. SILAS CHAMBERLAIN & another.

An indictment, purporting to have been found at the term begun and holden on the first Monday of July of a court which is required by law to begin and hold a term on the first Monday of every month, is not necessarily vitiated by the fact that the said Monday was the fourth day of July.

INDICTMENT with this caption : "Suffolk, to wit : At the superior court, begun and holden at the city of Boston, within and for the county of Suffolk, for the transaction of criminal business, on the first Monday of July in the year of our Lord one thousand eight hundred and seventy, the jurors for the Commonwealth of Massachusetts on their oath present," &c.

In the superior court, before the jury were empanelled, the defendants moved to quash the indictment, because "it appears, by an inspection of the indictment and its caption, that the proceedings of the grand jury in relation to the bill found against the defendants were informal, irregular and void, as having been had upon a day not juridical;" and *Wilkinson, J.*, overruled the motion. The defendants were tried and found guilty, and alleged exceptions.

*A. H. Briggs*, for the defendants.

*C. Allen*, Attorney General, for the Commonwealth.



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Commonwealth v. Dam.

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GRAY, J. Every term of the superior court in Suffolk for criminal business is required by law to be begun and held on the first Monday of the month. Gen. Sts. c. 114, § 16. That day in July 1870 having been the fourth day of July, the court could not indeed be opened, except for the purpose of entering or continuing cases, or adjourning. Gen. Sts. c. 122, § 4. But the caption of the indictment merely shows the day on which the term was begun and held, not the day of the return of the particular indictment, and is in the same form upon all the indictments returned at any time during the term. *Commonwealth v. Colton*, 11 Gray, 1. The record does not therefore show that this indictment was returned on the fourth day of July, and the ground of the motion to quash fails. *Exceptions overruled.*

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COMMONWEALTH *vs.* MELVIN E. DAM.

No exception lies to the ruling of the presiding judge as to the order of introducing evidence at a trial.

At the trial of a complaint for keeping a tenement resorted to for prostitution and lewdness, it appeared that the defendant also kept, adjoining but not communicating with the tenement, a shop with a room leading out of it; that the shop was resorted to by women reputed to be prostitutes, and men whose conduct with them was unchaste; and that persons reputed to be unchaste went from the shop to the tenement. *Held*, that an admission of the defendant that the room leading from the shop was let by him for prostitution was admissible in evidence.

COMPLAINT, in Middlesex, under the Gen. Sts. c. 87, §§ 6, 7, for maintaining a nuisance by keeping a tenement resorted to for prostitution and lewdness, in Lowell.

At the trial in the superior court, before *Brigham*, C. J., on appeal from the police court of Lowell, the Commonwealth introduced evidence tending to show that the defendant kept a shop with a room leading out of it, and also kept a tenement of four rooms adjoining the shop but not directly communicating with it, which was used by him as a residence for his family, and was the tenement mentioned in the indictment; that the shop was visited by persons reputed to be prostitutes, and by men whose conversa-

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Commonwealth v. Ackland.

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tion and conduct with them was indecent and unchaste; and that persons who were not inmates of the defendant's family and were reputed to be unchaste went from the shop to the said tenement.

After the defendant had put in his evidence, the Commonwealth offered proof of an admission of the defendant that the room contiguous to the shop was let by him for prostitution. The defendant objected to the admission of the testimony, on the ground that it was not relevant, and that, even if relevant, it ought not to be admitted at that stage of the trial; but the judge admitted it.

The jury returned a verdict of guilty, and the defendant alleged exceptions.

*A. R. Brown & E. A. Alger*, for the defendant.

*C. Allen*, Attorney General, for the Commonwealth.

BY THE COURT. The ruling of the judge as to the order in which this evidence was introduced, being within his discretion, was not subject to exceptions. *Commonwealth v. Moulton*, 4 Gray, 39.

The evidence was relevant; for both the conduct of the lewd persons who met at the shop, and the admission of the defendant, tended to show that they went from the shop to the tenement for the purpose of making it a nuisance in the manner alleged in the indictment.

*Exceptions overruled.*

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COMMONWEALTH vs. THOMAS ACKLAND.

At the trial of an indictment for illegally keeping and maintaining a tenement in Boston, the jury are authorized to infer that witnesses who testified that the tenement was on India Wharf meant India Wharf in Boston.

INDICTMENT, in Suffolk, for keeping and maintaining a tenement in Boston for the illegal keeping and sale of intoxicating liquors. At the trial in the superior court, before *Wilkinson, J.*, the defendant was convicted, and alleged exceptions.

It appeared from the bill of exceptions, that several witnesses testified that the defendant kept a liquor shop "at No. 4 India Wharf;" that there was no other evidence of the locality of the

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Commonwealth v. Cogan.

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defendant's tenement ; that the defendant requested a ruling that on the evidence he was entitled to an acquittal ; and that the judge refused so to rule.

*P. R. Guiney*, (*J. D. Fallon* with him,) for the defendant.

*J. C. Davis*, Assistant Attorney General, (*C. Allen*, Attorney General, with him,) for the Commonwealth.

BY THE COURT. It is now contended that, as the witnesses at the trial only spoke of the defendant's tenement as being at No. 4 India Wharf, there was not sufficient evidence to authorize the jury to find that the place was in Boston. This objection was not distinctly stated at the trial ; and if it had been, the jury would have been authorized to find that India Wharf in Boston was referred to, rather than some other place of that name, if there be such a place, in some other city or town.

*Exceptions overruled.*

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COMMONWEALTH vs. PATRICK COGAN.

A complaint for keeping and maintaining a tenement for the illegal keeping and sale of intoxicating liquors may be supported by proof of keeping and maintaining for such a purpose a shop consisting of one room and not forming part of a dwelling-house.

At the trial of a complaint for keeping and maintaining a tenement as a liquor nuisance, the judge instructed the jury that evidence that the tenement was fitted up with the paraphernalia of the liquor traffic might be considered, but, inasmuch as the sale of malt liquors was permitted, the evidence, so far as it tended to show a sale of malt liquors only, should be disregarded ; and that evidence that a tenement was fitted up for the traffic in liquors was of less significance now than formerly, when no sales of malt liquors were permitted. *Held*, that the defendant had no ground of exception.

A complaint for keeping and maintaining a liquor nuisance may be supported by proof that the nuisance was kept and maintained on a single occasion.

COMPLAINT, in Suffolk, under the Gen. Sts. c. 87, §§ 6, 7, for keeping and maintaining a tenement on April 6, 1870, and on divers other days between that day and October 6, 1870, for the illegal keeping and sale of intoxicating liquors.

At the trial in the superior court, before *Devens*, J., on appeal from the municipal court of the city of Boston, there was evidence that the defendant kept and maintained a shop on India Wharf in Boston ; that the shop was a room fronting on the wharf and extending back to Export Street, was fitted up and

equipped for the liquor traffic, and was used by the defendant, within the time specified in the complaint, for the purposes alleged ; and that the shop was not a dwelling-house, nor part of one. The defendant requested the judge to instruct the jury " that the shop described was not a tenement within the meaning of the statute," but the judge refused the request, and instructed the jury to the contrary.

The defendant also requested the judge to instruct the jury " that they were not authorized to infer the criminal use of the premises from evidence that the shop had the paraphernalia of the liquor traffic, if they should find that such paraphernalia were adapted to the sale of the permitted, as well as to the sale of the prohibited liquors ; that, if the evidence on that point was consistent with the innocence of the accused, however consistent it might also be with the theory of guilt, they were bound to hold him innocent as to such evidence." The judge refused so to rule, and instructed the jury " that if the evidence was consistent with the innocence of the defendant he could not be convicted ; that evidence that the shop was fitted up with the paraphernalia of the liquor traffic might be considered, but, inasmuch as the sale of malt liquors was permitted, the evidence, so far as it tended to show that only, should be disregarded ; and that the evidence that a shop was fitted up for the traffic in liquors was of less significance than formerly, when no sales of malt liquors were permitted."

The defendant further requested the judge to instruct the jury " that, as to the prohibited use of the premises, the Commonwealth must show that the use was a common or habitual use during some portion of the time alleged ; " but the judge refused so to rule, and instructed them " that the Commonwealth must prove that at some portion of the time named in the complaint the premises were kept and used by the defendant for the sale of intoxicating liquors ; that such use need not be the only use to which the premises were put by him ; and that it need not be shown that he so kept and used them during the whole time named in the complaint."

The jury returned a verdict of guilty, and the defendant alleged exceptions.

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Commonwealth v. Lynn.

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*P. R. Guiney*, (*J. D. Fallon* with him,) for the defendant.

*J. C. Davis*, Assistant Attorney General, (*C. Allen*, Attorney General, with him,) for the Commonwealth.

BY THE COURT. 1. The shop described was a tenement, within the meaning of the statute. *Commonwealth v. Godley*, 11 Gray 454. *Commonwealth v. McCaughey*, 9 Gray, 296.

2. Things adapted to the sale of prohibited liquors may be also adapted to many innocent uses. But their existence in this shop might be proved to the jury, and the instructions given to them as to the effect of such evidence were correct. *Commonwealth v. Higgins*, 16 Gray, 19.

3. This offence may be committed by a violation of the statute on a single occasion. *Commonwealth v. Gallagher*, 1 Allen, 592. *Commonwealth v. Higgins*, 16 Gray, 19.

*Exceptions overruled.*

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COMMONWEALTH vs. WILLIAM LYNN.

A complaint alleging that the defendant kept intoxicating liquor "with intent to sell the same in this Commonwealth, he not being authorized to sell the same in said Commonwealth for any purpose under the provisions of the acts of this Commonwealth, or by any legal authority whatever," sufficiently negatives that the alleged liquor was such as he had a right to sell.

COMPLAINT to the municipal court of the city of Boston, dated October 5, 1870, that William Lynn kept intoxicating liquor "with intent to sell the same in this Commonwealth, the said Lynn not being authorized to sell the same in said Commonwealth for any purpose under the provisions of the acts of this Commonwealth, or by any legal authority whatever."

The defendant demurred to the complaint, in the superior court, on appeal, on the ground that it did not aver that the "liquor is such as is forbidden to be kept for sale by the laws of this Commonwealth;" *Devens, J.*, overruled the demurrer; and the defendant was tried and found guilty, and alleged exceptions.

*P. R. Guiney*, for the defendant. By the St. of 1870, c. 389 the sale of certain intoxicating liquors, to wit, "ale, porter

strong beer, lager bier," is lawful. The provision in § 8 that nothing in the act shall "be construed to require any change in the forms of pleading now or heretofore used in the trials of criminal causes," if applicable to this case, is void as contravening the Declaration of Rights, art. 12, which requires that no one shall be held to answer for any offence "until the same is fully and plainly, substantially and formally, described to him."

*J. C. Davis*, Assistant Attorney General, (*C. Allen*, Attorney General, with him,) for the Commonwealth.

BY THE COURT. The allegation in this complaint, that the defendant kept intoxicating liquor "with intent to sell the same in this Commonwealth, he not being authorized to sell the same in said Commonwealth for any purpose under the provisions of the acts of this Commonwealth, or by any legal authority whatever," is sufficient. It excludes the idea that the liquors alleged to be kept were such as he had a right to sell. A like allegation has been held sufficient in several cases, which are decisive of the case at bar. *Commonwealth v. Hart*, 11 Cush. 130. *Commonwealth v. Gilland*, 9 Gray, 3. *Commonwealth v. Purtle*, 11 Gray, 78.

*Exceptions overruled.*

### THOMAS LESLIE vs. THE COMMONWEALTH.

If, on a complaint under the St. of 1869, c. 415, § 51, for the forfeiture of intoxicating liquors, the person complained against does not appear as a claimant, but consents on the record that the liquors may be destroyed without publication of notice, a writ of error brought by him to reverse the judgment will be dismissed on motion.

WRIT OF ERROR to reverse the judgment of a trial justice in Middlesex, forfeiting intoxicating liquors on a complaint under the St. of 1869, c. 415, § 51.

The record showed that the plaintiff in error was the person complained against as having the liquors in his possession; and that he in writing waived the publication of notice, and consented that the liquors should be destroyed. The assignment of errors is now immaterial. The attorney general moved that the writ be

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Commonwealth v. Intoxicating Liquors.

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dismissed, because the plaintiff in error was not a party to the cause; and *Ames, J.*, adjourned the case into the full court for its determination.

*F. F. Heard*, for the plaintiff in error.

*J. C. Davis*, Assistant Attorney General, (*C. Allen*, Attorney General, with him,) for the Commonwealth.

BY THE COURT. The record shows that Leslie appeared in the cause, and, instead of impleading the Commonwealth and claiming the liquors, entered his consent of record that the liquors should be destroyed without publication of notice.

*Writ dismissed.*

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COMMONWEALTH vs. CERTAIN INTOXICATING LIQUORS, John Cahill, claimant.

A complaint under the St. of 1869, c. 415, § 44, averred that certain intoxicating liquors were kept by J. C. of Boston, "in a certain building situate on B. Street and numbered one hundred and fifty-two on said street in said Boston, and the first floor of said building, occupied by said J. C. as a place of common resort kept therein," and prayed for a warrant to search "said first floor of said building." The warrant described the premises where the liquors were alleged to be kept, in the same words, and directed "the first floor of said building" to be searched. Held, that there was no variance between the complaint and the warrant.

An averment in a complaint for a warrant to search for intoxicating liquors, that the place to be searched was occupied as a place of common resort kept therein, is supported by proof that the place was a shop for the sale of liquors and that persons went in there, without restriction, for the purpose of buying liquors, although the sale was conducted in an orderly manner.

The right of peremptory challenge of jurors, given to the Commonwealth by the St. of 1869, c. 151, can be exercised on the trial of a complaint for the seizure of intoxicating liquors under the St. of 1869, c. 415.

COMPLAINT to the municipal court of the city of Boston, under the St. of 1869, c. 415, § 44, that certain intoxicating liquors were kept and deposited by John Cahill of Boston "in a certain building situate on Blackstone Street and numbered one hundred and fifty-two on said street in said Boston, and the first floor of said building, occupied by said Cahill as a place of common resort kept therein," and praying for a warrant to search "said first floor of said building." The warrant described the premises

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where the liquors were alleged to be kept, in the same words as the complaint, and directed the searching of "the first floor of said building."

The liquors were seized on the warrant; and Cahill appeared in the superior court as claimant, and demurred, "because it is not alleged, in either the complaint or warrant, that the liquors described were kept or deposited in the place commanded and prayed to be searched; and because the said place is not sufficiently described or averred;" but *Devens, J.*, overruled the demurrer.

The clerk then proceeded to empanel a jury; and the judge allowed the Commonwealth, against the objection of the claimant, to peremptorily challenge a juror.

At the trial, there was evidence tending to show "that the premises referred to in the complaint as a place of common resort were a shop for the sale of liquors, and were conducted in an orderly manner, but that intoxicating liquors were sold there, and that parties went in there, without restriction, for the purpose of buying liquors." The claimant requested the judge to instruct the jury that the evidence on this point would not support the complaint; but the judge declined so to do, and instructed them "that if they were satisfied, upon the evidence, that the premises were a shop for the sale of intoxicating liquors, open to the public, to which the public had free ingress for the purpose of purchasing such liquors, they would be warranted in finding that it was a place of common resort as alleged."

The jury returned a verdict for the Commonwealth, and the claimant alleged exceptions.

*P. R. Guiney*, for the claimant.

*C. Allen*, Attorney General, (*J. C. Davis*, Assistant Attorney General, with him,) for the Commonwealth.

**AMES, J.** The complaint charges that the liquors in question are kept by John Cahill in a certain building, (which is accurately described,) and the first floor of the said building, occupied by him as a place of common resort; and the warrant limits the search to that part of the building. We see no ground for the suggestion that there is a variance between the charge and the



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Commonwealth v. Sullivan.

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proof, or between the complaint and the warrant. The charge is, that the liquors are kept, not in the building indiscriminately, but in that part of it, viz. : the first floor, which was occupied by Cahill. The jury were instructed that if they were satisfied upon the evidence that the premises were a shop for the sale of intoxicating liquors, open to the public, to which the public had free ingress for the purpose of purchasing such liquors, they would be warranted in finding that it was a place of common resort. As it was in evidence not only that it was open to the public, but that parties went there without restriction, and that intoxicating liquors were sold there, there was no error in such an instruction.

By the St. of 1869, c. 151, the Commonwealth has a limited right peremptorily to challenge jurors in all criminal causes. The present complaint, although primarily a process *in rem*, to procure the condemnation and forfeiture of liquors illegally kept for sale, involves a criminal charge specifically set forth, of which the forfeiture is the punishment. *Commonwealth v. Intoxicating Liquors*, 13 Allen, 561. It is therefore a criminal cause within the meaning of the statute, and the challenge of the juror by the Commonwealth was properly allowed.

*Exceptions overruled.*

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COMMONWEALTH vs. MICHAEL SULLIVAN.

An indictment under the Gen. Sts. c. 161, § 85, for wilfully and maliciously "injuring" dresses, can be maintained without an averment that they were destroyed, although the evidence shows that they were so injured as to be unfit for further use, and worthless as dresses.

INDICTMENT, in Suffolk, under the Gen. Sts. c. 161, § 85,\* charging that the defendant did wilfully and maliciously injure four dresses and five skirts by wilfully and maliciously cutting and tearing each of them into many pieces, whereby they were all greatly damaged and injured.

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\* "Whoever wilfully and maliciously destroys or injures the personal property of another in any manner or by any means not particularly described or mentioned in this chapter, shall be punished," &c.

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Commonwealth v. O'Connor.

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At the trial in the superior court, before *Putnam, J.*, there was evidence that the dresses and skirts were greatly injured by being cut and torn, so that they were unfit for further use, and worthless as dresses and skirts in their then condition. The defendant requested the judge to instruct the jury that if, upon this evidence, they found that the articles were destroyed, they should acquit the defendant. The judge declined so to rule, on the ground that the evidence did not show that the articles were destroyed. The jury returned a verdict of guilty, and the defendant alleged exceptions.

*P. R. Guiney*, for the defendant.

*C. Allen*, Attorney General, (*J. C. Davis*, Assistant Attorney General, with him,) for the Commonwealth.

BY THE COURT. The jury were properly authorized to convict the defendant on the ground that the goods were injured.

*Exceptions overruled.*

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COMMONWEALTH vs. DENNIS O'CONNOR.

At the trial of an indictment for adultery, a witness having testified to several acts of adultery with the defendant, and among them to one committed on a certain day and at a certain hour and place, the district attorney elected to go to the jury on that one. The Commonwealth introduced evidence to show the loss by the defendant of a ticket under circumstances tending to corroborate the witness as to the commission of the adultery at the hour and place testified to, but showing that the ticket was lost on another day. The district attorney then stated that he elected to go to the jury on the adultery committed when the ticket was lost. *Held*, that the evidence was admissible, and the district attorney was entitled so to elect.

On the trial of an indictment for adultery with an unmarried woman, evidence is inadmissible that she was delivered of a child which might have been begotten about the time of the offence charged.

INDICTMENT found at October term 1870 of the superior court in Suffolk, for adultery alleged to have been committed by the defendant with Mary J. Marshall on January 15, 1870.

At the trial, before *Devens, J.*, Mary J. Marshall testified to several acts of adultery committed with her by the defendant, and among them to one as committed in a room in her father's house at half past seven o'clock in the evening of the day alleged.

The district attorney, upon the defendant's motion that he should elect between these acts, elected to go to the jury on this adultery committed on January 15.

The Commonwealth, against the objection of the defendant, was allowed to introduce evidence to show the loss by the defendant of a ticket to a fair, under circumstances tending to corroborate the testimony of Mary J. Marshall as to the commission of the adultery at the hour and place testified to by her; but the evidence showed that the ticket was lost on a day between February 7 and February 28. The district attorney then stated that he elected to go to the jury on the adultery committed upon the occasion when the ticket was lost, on the ground that the date of an offence need not be proved as laid; and the judge, against the defendant's objection, allowed him to do so.

The Commonwealth was allowed, against the objection of the defendant, to introduce evidence tending to show that Mary J. Marshall, who was unmarried, gave birth to a child in September 1870. The jury returned a verdict of guilty, and the defendant alleged exceptions.

*P. R. Guiney, (J. D. Fallon with him,)* for the defendant.

*J. C. Davis, Assistant Attorney General, (C. Allen, Attorney General, with him,)* for the Commonwealth.

AMES, J. 1. The prosecuting officer, being called upon to elect upon which of several acts of adultery, described by the witness, he would go to the jury, made choice of one occurring at the place named on the evening of January 15. The time was more specifically identified by the circumstances attending the loss by the defendant of his ticket for admission to a fair. These circumstances made it certain, however, that the evening in question could not have been that of January 15, but of some date between February 7 and February 28. But the occasion, time and place could as well be identified by their connection with the time of some other event, as by the date in the calendar. The error in the assumed date would be wholly immaterial, provided the act charged were sufficiently identified by other circumstances. It is enough that it occurred on the night when the loss of the ticket occurred.

2. The rulings at the trial were correct and sufficiently favorable to the defendant, with one exception. The paternity of the child was not the subject of inquiry, and it is difficult to see how the fact or the date of its birth could be material to the question at issue. It had no tendency to show the defendant's guilt on the occasion referred to in the indictment, and we cannot say that the evidence of the fact may not have had some effect upon the minds of the jurors to his prejudice. On this point, therefore, the  
*Exceptions are sustained.*

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COMMONWEALTH vs. WILLIAM R. FOSTER.

If one who is employed by the maker of a promissory note, not as a broker, but merely to sell it and receive the proceeds and pay them over specifically to a third person, fraudulently converts them to his own use, he is guilty of embezzlement, although, upon receiving the note, he gave to the maker his own note for the same amount, if it was agreed that his note should be deposited with the third person as a receipt, to be given up to him upon his paying over the said proceeds.

INDICTMENT for embezzlement, found at July term 1870 of the superior court in Suffolk.

At the trial, before *Wilkinson, J.*, John Langley testified that about May 13, 1870, being in need of money, he made two promissory notes payable to his own order and indorsed by himself, payable in four and six months respectively, for \$1250 each, and delivered them to the defendant upon the special agreement of the defendant to sell the notes and deliver the proceeds to Nathan A. Langley, a brother of the witness, charging a commission for his services; that at the same time, and as a part of the transaction, the defendant gave to the witness, as receipts, the defendant's own notes of the same tenor and date as those delivered to him by the witness, which were deposited by the witness with his brother, to be by him given up to the defendant when the latter should deliver the proceeds of the witness's notes in pursuance of the agreement before stated; and that he did not know whether the defendant was a broker or not, and did not deal with him as such.

It further appeared that the defendant sold the notes of John Langley to one Wilson for \$1000 in cash, and a mortgage on real estate valued at \$1000; and that he had not delivered any part of the proceeds to John Langley or his brother, but, when asked for them by the former, replied that he had used them and was unable to deliver them. It did not appear that John Langley or his brother had tendered to the defendant the notes given by him.

Upon the close of the evidence for the Commonwealth, the defendant demurred thereto, as insufficient to support a verdict of guilty; but the judge overruled the demurrer. The defendant then testified that he was a real estate broker; and that he negotiated the notes in the manner testified to by John Langley, and used the money, partly in business as a provision dealer, in which he was also engaged at the time, and partly in paying his debts.

The judge thereupon instructed the jury "that it was a question of fact, for them to decide upon the evidence, whether John Langley employed the defendant as a broker; that if the defendant was employed merely to sell the notes, receive the proceeds and pay over the same specifically to the brother, without any authority to mix them with his own funds, a fraudulent conversion of them would be embezzlement; but that if he was employed as a broker, to negotiate the notes in the course of his business, with authority, derived from the nature of that business or otherwise, to mix the proceeds as aforesaid, his use of them would not be embezzlement." The jury returned a verdict of guilty, and the defendant alleged exceptions.

*C. R. Train*, for the defendant.

*C. Allen*, Attorney General, for the Commonwealth.

BY THE COURT. Under the instructions given them, the jury must have found that the defendant was an agent within the statute, and embezzled his employer's money. The notes given by him appear to have been given to answer the purpose of receipts, and not for the purpose of transferring to him any property in the notes received by him, or the money received by him on the sale of the notes. *Commonwealth v. Stearns*, 2 Met. 348 *Commonwealth v. Libbey*, 11 Met. 64. *Exceptions overruled.*

## COMMONWEALTH vs. JAMES C. CHESLEY.

An indictment for obtaining money under false pretences alleged that the defendant, intending to cheat B. H., falsely represented to her that he had a lease of a building which he was authorized to assign to her; that by these representations she was induced to, and did, purchase and receive his pretended right and estate in said building, and to hire, and did hire, said building of him, "and to pay and deliver, and did pay and deliver," to him certain moneys; and that he sold, assigned and delivered his pretended right, and let said building, and "did then and there receive and obtain" the said moneys. No objection was made to the sufficiency of the indictment. *Held*, on the trial, that evidence as to what B. H. paid the money for, and what it was received for, was admissible.

Under the general issue in a criminal case the defendant cannot show a former acquittal. On the trial of an indictment, testimony that the evidence in support of it was the same as that in support of a former indictment, on which the defendant was acquitted, is inadmissible, if the record shows that the acquittal was on the ground of a variance.

INDICTMENT, in Suffolk, alleging that the defendant, intending to cheat and defraud Bridget Hurley, and to effect the sale and assignment of his pretended interest in a certain building, falsely represented to her that he held a lease of the building, two years and ten months of which were unexpired, and that he had a good right, title, estate and interest in the building, which entitled him to assign and sell the lease, and to let the building for that unexpired time; and further alleging that she "was induced, by reason of the false pretences and representations so made as aforesaid, to purchase and receive, and did then and there purchase and receive, of the said Chesley, the said Chesley's pretended right and estate in the said building, and to hire, and did then and there hire, the said building of the said Chesley for the said term of two years and ten months, and to pay and deliver, and did then and there pay and deliver, to the said Chesley," certain moneys, "and the said Chesley did then and there sell, assign and deliver his said pretended right, and did then and there let the said building for the said term of two years and ten months, and did then and there receive and obtain" the said moneys "by means of the false pretences and representations, and with intent to cheat and defraud" her of the moneys.

At the trial in the superior court, before *Putnam, J.*, Bridget Hurley was a witness, and the defendant objected to her stating

what she paid the money for, on the ground that there was no averment in the indictment as to what she paid money for, or what it was received for; but the judge overruled the objection. The defendant requested the judge, after the evidence was in, to instruct the jury that, for the same reason, no conviction could be had under this indictment; but the judge refused so to rule.

The defendant, having been called as a witness, was asked by his counsel this question: "At the trial of the complaint in the former case, was the evidence to substantiate the allegation of obtaining \$50, mentioned in the said complaint, attempted to be supported by the same evidence as in this case?" The Commonwealth objected to this question; and the defendant's counsel, being inquired of as to the purpose of it, stated "that the defendant had been once complained of for this offence, in the municipal court of the city of Boston; that on appeal to the superior court he was tried and acquitted; and that he should claim that these proceedings were a bar in this case." The record of the former trial was then produced, and it appeared, upon inspection of it, that the verdict was "Not guilty, by reason of a variance." The judge thereupon refused to allow the question to be put.

The jury returned a verdict of guilty, and the defendant alleged exceptions.

*P. H. Hutchinson*, for the defendant.

*C. Allen*, Attorney General, (*J. C. Davis*, Assistant Attorney General, with him,) for the Commonwealth.

COLT, J. This indictment is to be taken as sufficient. No question was raised at the trial in regard to it, and it is too late to raise any formal objection to it now.

The evidence objected to was admissible. It was necessary, in order to prove the offence, to show that the pretences used were false, and were effectual in accomplishing the fraud charged. *Commonwealth v. Hulbert*, 12 Met. 446.

If the defendant relied upon a former acquittal, he should have pleaded it specially, so that issue might have been taken upon it, either to the court or the jury. It cannot be proved under the general issue. *Commonwealth v. Merrill*, 8 Allen, 545. The record in the present case showed that the former acquittal was

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McLaughlin's case.

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by reason of a variance, and so could not be a defence to this indictment. The offence for which the defendant was here tried and convicted was not the offence described in the former indictment, or there could have been no variance. *Commonwealth v. Wade*, 17 Pick. 395, 401. *Exceptions overruled.*

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THOMAS McLAUGHLIN'S CASE.

Under the Gen. Sts. c. 168, § 8, which provides that, if an offence is punishable by imprisonment in the state prison for five years or more, an attempt to commit it shall be punished by imprisonment in the state prison not exceeding five years or in the jail not exceeding one year, and that, if an offence is punishable by imprisonment in the state prison for a term less than five years or by imprisonment in the jail or by fine, an attempt to commit it shall be punished by imprisonment in the jail not exceeding one year or by fine not exceeding three hundred dollars, a person convicted of attempting to commit an offence punishable by imprisonment not exceeding five years in the state prison may be sentenced to imprisonment in the state prison, although the offence is also punishable by fine or imprisonment in jail.

HABEAS CORPUS to the warden of the state prison, upon the petition of a prisoner there confined. Hearing in Suffolk, before the chief justice, who reserved the case for the determination of the full court. The facts are stated in the opinion.

*S. B. Ives, Jr.*, for the petitioner.

*J. C. Davis*, Assistant Attorney General, (*C. Allen*, Attorney General, with him,) for the Commonwealth.

BY THE COURT. The petitioner has been convicted of an attempt maliciously to poison a horse contrary to the Gen. Sts. c. 161, § 80, and c. 168, § 8.\* He has been sentenced to two years' imprisonment in the state prison, and it is alleged that this sentence is illegal. The penalty for the offence of poisoning a horse is imprisonment in the state prison not exceeding five years, or a fine not exceeding one thousand dollars and imprisonment in the jail not exceeding one year.

Section 8 of chapter 168, prescribing the punishment for an attempt to commit an offence, has three clauses. The first clause relates to an attempt to commit an offence punishable with death.

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\* See 105 Mass. 460.



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McLaughlin's case.

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The second clause, upon which the sentence in this case was founded, is as follows: "If the offence so attempted to be committed is punishable by imprisonment in the state prison for life, or for five years or more, the person convicted of such attempt shall be punished by imprisonment in the state prison not exceeding five years, or in the jail not exceeding one year."

The petitioner's counsel contends that the sentence ought to have been under the third clause, which is as follows: "If the offence attempted to be committed is punishable by imprisonment in the state prison for a term less than five years, or by imprisonment in the jail or by fine, the offender convicted of such attempt shall be punished by imprisonment in the jail not exceeding one year, or by fine not exceeding three hundred dollars; but in no case shall the punishment by imprisonment exceed one half of the greatest punishment which might have been inflicted if the offence attempted had been committed."

It is true, as he alleges, that the punishment for the completed offence of poisoning a horse may be by imprisonment in the state prison for a term less than five years, or by a fine and imprisonment in the jail. He contends that the statute is to be construed *in favorem libertatis*; and that, as the completed offence may be punished by fine and imprisonment in the jail merely, the attempt should not be construed to be a felony, and punishable by imprisonment in the state prison in any case.

But we do not think the sections quoted above will bear this construction. The completed offence is punishable by imprisonment in the state prison for five years; and this makes the second clause, relating to the attempt to commit it, applicable to the case. The third clause is limited in its application to cases where the extreme punishment for the completed offence is by imprisonment in the state prison for a term less than five years.

*Prisoner remanded.*

## COMMONWEALTH vs. CHARLES H. HATFIELD.

Since the St. of 1830, c. 136, § 1, it is no objection to an indictment for perjury on an examination before a commissioner "legally authorized and duly qualified to take bail" to be accepted as bail for a person committed to jail, that it does not allege whether the person was committed with or without an order fixing the amount of bail, or that any notice was given to the officer who committed him to jail, although the Gen. Sts. c. 170, § 37, require such notice if the amount is not fixed; and exceptions taken at the trial of the indictment, to the admission of the record of the proceedings, will not be sustained, if they fail to show any irregularity in the proceedings.

An indictment for perjury, which avers that the defendant, having offered himself as bail, was required by the bail commissioner to make, and did make, a written statement of his property, the same being material to aid the commissioner in determining whether to accept him, and, being duly sworn, did falsely, knowingly and corruptly depose and swear in and by said written statement, (here setting forth the words of a statement purporting to be signed by the defendant,) sufficiently alleges that the defendant knowingly and falsely made statements under oath which were material, and is supported by proof that the defendant made oath to the matters contained in the statement set forth in the indictment, and that such statement was material, although the body of the statement was written by the commissioner, and the defendant was sworn to its truth before and not after affixing his signature.

An indictment for perjury can be maintained against a person for making a false statement, on an examination to be admitted as bail, to the effect that he owned certain parcels of land, if he did not own some of the parcels, although the value of others of the parcels, which he did own, was sufficient to cover the amount of bail for which he offered himself.

At the trial of an indictment for falsely swearing that the defendant owned a dwelling-house, evidence was introduced tending to show that the house was devised to the defendant's wife. *Held*, that the testimony of a witness was admissible that he had examined the indexes in the registry of deeds from before the date of the devise to the present time, and found no conveyance of the house to the defendant or any one else.

INDICTMENT, in Suffolk, for perjury, setting forth in substance that Mary Ross was committed to jail by order of the municipal court of the city of Boston, for failure to find sureties for her appearance before said court; that the defendant, before John G. Locke, a commissioner "legally authorized and duly qualified to take bail," offered himself as bail and security for her; that he was lawfully required by the commissioner, "pursuant to the course and practice of taking and approving bail, to make a written statement of his, said Hatfield's, circumstances and property, the same being material to aid said commissioner in determining whether he would and should take and approve said Hatfield as such bail and surety; and that said Hatfield did then and there,

in pursuance of said requirement, make said written statement, and being then and there duly sworn did then and there falsely, knowingly and corruptly depose and swear in and by said written statement" (which was set forth in the indictment, and purported to be signed by the defendant) that he was the owner of four dwelling-houses in Medford, of the value of \$11,000, and of three houses in Boston, one on Cooper Street and two on Hanover Street, all of the value of \$20,000, whereas he was not the owner of any houses in Medford, and was not the owner of the house on Cooper Street or of the houses on Hanover Street, in Boston, as he, "at the said time he so deposed and swore as aforesaid, then and there well knew."

The defendant moved, in the superior court, to quash the indictment, because there was "no allegation therein of any commitment of Mary Ross, with an order fixing the amount of the recognizance, nor any allegation that in the absence of such order, so fixing said amount, reasonable notice of the application of said Mary Ross was given to the officer by whom she was committed;" and also because there was no allegation that the defendant was required to make the written statement under oath, or that he was sworn to make a true written statement, or that he was sworn to the truth of it. But *Putnam*, J., overruled the motion.

At the trial, the clerk of the municipal court attended as a witness, with the record of that court in the case of Mary Ross, who was complained of for larceny. The record had not been extended, but the clerk produced his docket with the entries therein, and all the papers in the case which were on file, including the complaint, warrant, mittimus, recognizance, and the written statement as set forth in the indictment, purporting to be signed by the defendant and which the clerk testified was filed by Locke.

The evidence tended to show that the defendant offered himself as bail before Locke; that Locke swore him to make true answer to such questions as he should put to him; that he then questioned him, and wrote down the answers; and that the defendant was sworn to the statement after it was drawn up, and then signed it.

There was evidence that the houses in Boston were devised in 1861 to the defendant's wife, by her mother's will. The Commonwealth then called Heman W. Chaplin as a witness, and he was allowed, against the defendant's objection, to testify that he had examined the classified indexes in the registry of deeds of Suffolk County, from one year before the death of the mother of the defendant's wife down to the present time, and that he found no conveyance of these houses, or any of them, to the defendant or any one.

The defendant requested the judge to instruct the jury that there was a variance between the indictment and the proof, but the judge refused to do so. He then requested the judge to instruct them that the defendant's statements about the houses in Boston were immaterial, because it appeared that the value of the houses in Medford was sufficient to cover the amount of the recognizance. But the judge declined to do so, and instructed the jury "that the materiality of the statement depended upon the question at issue, and the nature of the proceeding; that the commissioner was about to decide whether the defendant, who had offered himself as bail, was a proper person for that purpose; that the inquiry for the jury then was, whether what property the defendant owned was or was not a material matter for the commissioner to inform himself about in determining that question, and whether or not the statement was made by the defendant for the purpose of inducing the commissioner to take him as bail, and was calculated to influence him in doing so; and that the inquiry was not as to whether, in point of fact, the defendant was sufficient as bail, even if he did not own this property, but as to the materiality of his representations as to his sufficiency."

The jury returned a verdict of guilty, and the defendant alleged exceptions.

*W. W. Warren*, for the defendant.

*C. Allen*, Attorney General, (*J. C. Davis*, Assistant Attorney General, with him,) for the Commonwealth.

COLT, J. 1. The defendant moves to quash the indictment because it fails to allege facts necessary, as he claims, to the jurisdiction of the bail commissioner before whom the alleged perjury

was committed. He relies upon the provisions of the Gen. Sta. c. 170, §§ 35-37. A person who has been committed to jail, either with or without an order fixing the amount of the recognizance, may be admitted to bail. But when the amount is not fixed, reasonable notice to the officer who committed him is required by the statute to be first given. It is not stated in this indictment, whether the prisoner was or was not committed under an order fixing the amount of the recognizance. And it is therefore insisted that, without the allegation of notice to the officer, the authority of the commissioner is not sufficiently set forth. It would seem that the bail bond or recognizance, even if the notice were not given in fact, would still be valid and binding upon all parties; and if so, this requirement must be deemed directory in character, and not a condition precedent to the exercise of the jurisdiction. The more decisive answer is, that it is not now necessary, in an indictment for perjury, to set forth the authority of the court or person before whom the offence was committed. It is here averred that the defendant was lawfully required to make a statement of his property before a commissioner authorized and duly qualified to take bail; and this was a sufficient allegation of authority, as the law now stands. Sts. 1860, c. 186, § 1; \* 1862, c. 159, § 1. *Commonwealth v. Hughes*, 5 Allen, 499.

2. It is further objected, that the indictment does not allege that the defendant was required to make a written statement un-

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\* "In every indictment for perjury, or for unlawfully, falsely, fraudulently, deceitfully, maliciously or corruptly taking, making, signing or subscribing any oath, affirmation, declaration, affidavit, deposition, bill, answer, notice, certificate or other writing, it shall be sufficient to set forth the substance of the offence charged upon the defendant, (if the perjury be alleged to have been committed in a criminal case,) or the nature of the controversy in general terms, (if the perjury be alleged to have been committed in any civil suit or proceeding,) and by what court, or before whom the oath, affirmation, declaration, affidavit, deposition, bill, answer, notice, certificate or other writing was taken, made, signed or subscribed, without setting forth the bill, answer, information, indictment, declaration, or any part of any proceeding, either in law or in equity, and without setting forth the commission or authority of the court or person before whom the offence of perjury was committed."

der oath ; or that he was sworn to make it ; or that he was sworn to the truth of it, when made. The indictment contains all the material averments to be found in *Commonwealth v. Hughes*, 5 Allen, 499. It sufficiently alleges, as we construe it, that the defendant knowingly and falsely made statements under oath which were material. It can make no difference that, either before or after the oath was administered, the statements made were reduced to writing and signed by the defendant. The offence consists in the false statement of material facts under oath, knowing them to be false, without reference to the mode of statement, whether oral or written. *Commonwealth v. Carel*, 105 Mass. 582.

3. The clerk's docket and the papers filed in the case constitute the record, and are competent evidence until the record is extended. *McGrath v. Seagrave*, 2 Allen, 444. There is nothing in the exceptions to show any irregularity in these proceedings, or that they were not sufficient to give the commissioner authority to act. If the record showed that the amount of the recognizance was fixed by the order of the court, it would be sufficient, without regard to the question of notice to the officer.

4. There was no variance, for the reasons already given, between the proofs as to the manner in which the statements were made and sworn to, and the allegations in the indictment. The proof was ample, that the defendant made oath to the matters contained in the written paper. If it were a question of variance between the paper produced and the recital in the indictment, it would be sufficient, under the recent statute, if the identity of the instrument was evident and the purport sufficiently described to prevent prejudice to the defendant. St. 1864, c. 250, § 1.

5. It was not necessary for the government to prove the falsity of the statement in all its details. If the defendant did not own all the items of property enumerated, then it was false and material as a representation of his responsibility as surety, even though a part of the property was sufficient to cover the amount of the recognizance. The evidence to prove the falsity was competent. It would perhaps have been sufficient to prove title in the defend

## Commonwealth v. Holliston.

ant's wife under the will, and rely on the presumption of its continuance in her; but the fact that the records showed no conveyance from her, in the absence of any evidence of title in the defendant, strengthens the presumption of title still in the wife.

We see no error in the rulings, refusals or instructions of the superior court.

*Exceptions overruled.*

## COMMONWEALTH vs. INHABITANTS OF HOLLISTON.

Allowing a witness, on a trial, to use a map not verified by oath, to point out to the jury, of his own knowledge, the location of a way, is within the discretion of the judge, and affords no ground of exception.

To prove that a road was a highway before 1846, evidence that before and after that date it was repaired under the orders of one who was acting surveyor of highways of the town, and publicly exercised the duties of the office, is admissible, under the Gen. Sta. c. 44, § 26, without proving his appointment by the records of the town.

INDICTMENT, in Middlesex, for neglect to keep in repair a road, alleged to be a highway, in Holliston.

At the trial in the superior court, before *Scudder, J.*, the defendants contended that the road was not a highway. The Commonwealth admitted that it could not prove that the road was laid out and established as a highway in the manner prescribed by statute; but contended that, before 1846, it had either become a highway by dedication, or been laid out for many years and no record of the laying out been kept.

“For the purpose of explaining to the jury the relative location of the premises described in the indictment, but not as legal evidence in the case, the counsel for the Commonwealth placed a map thereof in the hands of a witness, and asked him from his own knowledge to point out the location, so far as it was correctly represented thereon. This was objected to by the defendant, but was permitted by the judge for the purpose stated only, and the map was then withdrawn from the jury.”

For the purpose of showing that before 1846 the road had either been dedicated and accepted as a highway or been laid out as alleged, the Commonwealth offered the testimony of several

witnesses that "prior to that date they, with others, at various times, worked upon the road in repairing it under the order and directions of Thomas Rockwood, an acting surveyor of highways of the town in the district within which the road was located, who then and before had publicly exercised the duties of that office within and for said district." The defendant objected to the admission of this evidence, unless it should be shown by the records of the town that Rockwood had been elected or appointed by the proper authorities of the town as surveyor of a district within which this road was; but the judge admitted it.

For the same purpose the Commonwealth further offered evidence, against the objection of the defendants, tending to show that "similar acts had been once or twice performed by some one acting as surveyor of highways for the town in said district, and publicly exercising the duties of that office in and for said district, since 1846." The judge admitted the evidence, but instructed the jury that "unless they were satisfied beyond a reasonable doubt that the dedication and acceptance of the road had been completed, or the road had become a public highway, as claimed, before 1846, they must find for the defendants."

The jury found the defendants guilty, and they alleged exceptions.

*L. W. Osgood*, for the defendants.

*J. C. Davis*, Assistant Attorney General, (*C. Allen*, Attorney General, with him,) for the Commonwealth.

CHAPMAN, C. J. The map was used, not as legal evidence in the case, but to enable the witness, into whose hand it was put, to point out to the jury the location of the alleged way, so far as it was correctly represented thereon. For this purpose it was within the discretion of the judge to allow it to be used. *Hollenbeck v. Rowley*, 8 Allen, 473, 475.

Since the St. of 1846, c. 203, highways cannot be established by dedication. *Commonwealth v. Taunton*, 16 Gray, 228. Before that time they could be thus established, as well as by prescriptive use. In *Jennings v. Tisbury*, 5 Gray, 73, the court say that "a large proportion of the public ways, whether they be considered public highways or town ways, stand upon no other



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Commonwealth v. Blaisdell.

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title but prescription," and that the time of prescription is now to be considered as fixed at twenty years. See also *Commonwealth v. Old Colony & Fall River Railroad Co.* 14 Gray, 93, 94. It had formerly been thirty years.

By our statutes, the acts of a highway surveyor in repairing a highway are made evidence against the town to prove that it is a highway. Gen. Sts. c. 44, § 26. Evidence that prior to 1846 Thomas Rockwood was acting surveyor of highways of the town, and publicly exercised the duties of the office, and that under his order and direction persons worked upon the road in repairing the same, was competent to prove that he held that office, without proving his appointment by the town records. 1 Greenl. Ev. (12th ed.) § 92, and notes. Such repairs were evidence tending to show the existence of the way at that time either by dedication or prescription. Evidence of similar repairs after 1846 would tend, in connection with the other evidence, to show the continued existence and recognition of the way, in like manner as evidence that it had been closed up and no longer worked would tend to disprove its existence as a public way.

The whole evidence is not reported, and the only question presented respecting all this evidence is whether it was admissible. We are of opinion that it was. *Exceptions overruled.*

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COMMONWEALTH vs. SARAH J. BLAISDELL.

Steps projecting from a house into a highway so as to obstruct it are a nuisance at common law; and under the Gen. Sts. c. 46, §§ 1, 2, maintaining them for any time less than forty years is no bar to an indictment therefor.

INDICTMENT for maintaining a nuisance in Hurd Street, a highway in Lowell, on January 1, 1870.

At the trial in the superior court in Middlesex, before *Scudder, J.*, it appeared that Hurd Street was laid out as a highway June 26, 1839, and the boundaries thereof shown and made certain; that the defendant, at the time charged, owned a dwell

ing-house on the street, with three front steps projecting into the street about three and a half feet; and that these steps constituted the nuisance. There was also evidence tending to show that the steps were placed there as early as the year 1834.

The defendant requested the judge to instruct the jury, that, if they should find that the steps were placed there before December 31, 1839, then, upon the evidence, the indictment could not be maintained; the judge refused the request; the jury returned a verdict of guilty; and the defendant alleged exceptions.

*R. B. Caverly*, for the defendant.

*J. C. Davis*, Assistant Attorney General, (*C. Allen*, Attorney General, with him,) for the Commonwealth.

GRAY, J. Placing or maintaining a building, stones or other obstructions in a public highway, without lawful authority, is a nuisance at common law, and indictable as such. *Commonwealth v. King*, 18 Met. 115. *Stoughton v. Porter*, 13 Allen, 191. *Rosc. Crim. Ev.* (6th ed.) 541. By the statute provisions now in force, which took effect from and after December 31, 1839, when the boundaries of a highway are made certain, (as they were in this case,) the continuance of a building in a highway cannot be justified by any length of time less than forty years, but may be indicted as a nuisance. *Rev. Sts. c. 24*, §§ 61, 62. *Gen. Sts. c. 46*, §§ 1, 2. This provision did not injuriously affect any private right, but merely shortened the period of limitation in such cases, which had previously been sixty years. *St. 1786, c. 67*, § 7. *Cutter v. Cambridge*, 6 Allen, 20. The front steps leading to a dwelling-house are clearly part of the building, and when they project into the highway, the building is in the highway, within the meaning of the statute. *Hyde v. Middlesex*, 2 Gray, 267. The instruction requested was therefore rightly refused.

*Exceptions overruled.*

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Commonwealth v. Metropolitan Railroad Company.

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## COMMONWEALTH vs. METROPOLITAN RAILROAD COMPANY.

An indictment under the St. of 1864, c. 229, § 37, can be maintained against a street railway corporation for causing the death of a person, although it does not allege that the death was instantaneous.

On the trial of an indictment under the St. of 1864, c. 229, § 37, against a street railway corporation for causing the death of a person, there was evidence tending to show that the deceased, a girl two years and one month old, went from home, with her mother's consent, in the charge of a girl sixteen years old; that, when last seen before the accident, they were half way across a straight, level street, sixty feet wide; that the child was there run over by the defendants' car and killed; and that the driver of the car was at the time looking at a fire in the neighborhood. *Held*, that the evidence warranted the jury in finding that the deceased was in the exercise of due care and the defendants were guilty of negligence.

INDICTMENT under the St. of 1864, c. 229, § 37, against a street railway corporation, for driving a car against and over Margaret Shaughnessey, whereby her life "was thereafterwards on the same day lost." In the superior court in Suffolk, before the jury were empanelled, the defendants moved, and *Putnam, J.*, overruled the motion, to quash the indictment, because it did not appear thereby "that said Margaret immediately lost her life by reason of any alleged negligence of the defendants;" or "how soon death followed from said alleged negligence;" or "but that she lived sufficient length of time after said alleged injury for damages to have been recovered for injuries which she suffered from said alleged negligence of the defendants, in the civil side of the court, by her representatives during her lifetime;" or but that she was in full possession of her reason and mental faculties from the time of the accident to the time of her death.

At the trial, the Commonwealth introduced evidence tending to show that the deceased, a child two years and one month old, went from her home in Boston, with her mother's consent, five minutes before the accident, in the charge of a girl sixteen years old, who had lived in the family; that this girl was seen, two minutes before the accident, coming down Middle Street with the child; that Middle Street leads into Dorchester Avenue, along which are two tracks for the defendants' cars; that Dorchester Avenue was there sixty feet wide, level and straight; that when

the girl and child were last seen, they were half way across Dorchester Avenue from Middle Street ; that the child was there run over and killed by a car of the defendants ; and that the driver of the car, who had charge of the brakes, was at the time looking at a fire in the neighborhood. The defendants introduced evidence which is now immaterial ; and it was conceded, on all the evidence, that the child was instantly killed.

The defendants requested the judge to instruct the jury that there was no evidence that the driver was unfit, negligent or careless at the time of the injury, or that Margaret Shaughnessey was at and before the time of the injury in the exercise of due care ; but the judge refused the request, and submitted the case to them under instructions not otherwise excepted to. The jury returned a verdict of guilty, and the defendants alleged exceptions.

*W. A. Field*, for the defendants.

*N. St. J. Green*, for the Commonwealth.

COLT, J. Liability to indictment under the statute for death caused by the negligence of a street railway corporation is not confined to cases where the death is instantaneous. There is no such limit in express terms ; nor does the fact that a civil action for damages lies, under another statute, in favor of the legal representative, when the death is not instantaneous, justify the interpretation contended for. St. 1864, c. 229, § 37. Gen. Sts. c. 127.

A common law action, surviving under the statute to the administrator, and an indictment under the statute, do not cover the same ground. In the former, damages for the personal injury to the deceased are alone recovered ; in the latter, the purpose is to secure to the relatives some compensation for the loss to them, as well as to inflict some punishment for the offence. In one, damages are recovered by the legal representatives, which in the due settlement of the estate may never come to the relatives. In the other, the amount of the fine, within the limit named in the statute, is fixed by the court, and paid to the use of the widow and children in equal moieties, or to the next of kin, as the case may be. It is not important to consider now what effect, if any, proof of a judgment in a civil action, or a settlement with the

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*Commonwealth v. Metropolitan Railroad Company.*

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party injured or his representative, would have upon the prosecution of an indictment for the same act of negligence. *Read v. Great Eastern Railway Co.* Law Rep. 8 Q. B. 555. It is enough that it was not necessary to allege, in this indictment, that the death was instantaneous; and the motion to quash was therefore properly overruled. *Bancroft v. Boston & Worcester Railroad Co.* 11 Allen, 34.

It is claimed that the refusal of the court to rule at the trial as requested, on the question of due care and negligence, was erroneous. The case here, in the opinion of the court, falls within the case of *Mulligan v. Curtis*, 100 Mass. 512, for the evidence, although conflicting and of doubtful preponderance, is sufficient to justify the jury in finding that there was due care on the part of those having the custody of the child, and also that there was negligence on the part of the defendants. The whole or a part of the defendants' evidence may have been discredited by them; and we must take the case as left by the Commonwealth.

There was certainly evidence which tended to show that the child went from home with the mother's knowledge and consent, five minutes before the accident, in charge of a girl who had lived in the family, and who was of an age sufficiently mature to have the proper custody of it; that this girl was seen with the child, in the street, going towards the place of the accident, two minutes before it occurred, and when last seen was with the child half way across the street or avenue through which the cars passed, and which was there sixty feet wide, with two tracks for cars, and was both level and straight. This was evidence of due care, to be submitted to the jury with proper instructions. And as to the negligence of the defendants' servants, it is enough that there was evidence that the attention of the driver of the car, who had charge of the brakes, was attracted from his duties, at the time, towards a fire which was burning in the neighborhood, so that he failed to stop the car in time. *Exceptions overruled.*

## COMMONWEALTH vs. JOHN MORAN.

At the trial of an indictment for the murder of a constable, it appeared that the deceased was killed while attempting to arrest the defendant upon a warrant which bore an indorsement signed by a deputy sheriff to the effect that he had arrested the defendant and had him before the magistrate who issued the warrant. *Held*, that parol evidence was admissible to prove that the warrant was never served by the deputy sheriff, that the defendant was never arrested or brought judicially before the magistrate, and that the warrant, though given up by the deputy sheriff to the magistrate, was by the latter returned to him for service and by him given to the deceased; and that these facts, if proved, showed that the warrant was sufficient in the hands of the deceased to authorize the arrest of the defendant.

INDICTMENT for the murder of Charles M. Packard. At the trial, in Norfolk, before *Chapman*, C. J., and *Colt, Ames and Morton*, JJ., it appeared that Packard was a constable of Stoughton, and was killed by the defendant in that town on September 15, 1870, while he was attempting to arrest the defendant upon a warrant issued on August 9, 1870, by J. White Belcher, Esq., a trial justice for the county of Norfolk, addressed to the sheriff of the county or his deputy, or any constable or police officer of any town in the county, directing them respectively to take the defendant and bring him before the justice to answer to a complaint of Michael McLaney against him for an assault, and bearing this indorsement, signed by William H. Warren, a deputy of the sheriff of the county: "Norfolk, ss. September 12, 1870. By virtue hereof, I have arrested the body of the within named John Moran, and have him before J. White Belcher, Esquire, for examination; and I have summoned as witnesses, on behalf of the Commonwealth, . . . . Fees: Service, \$0.50. Travel 8 miles, \$0.80. Custody and expenses, \$4.00. Attending court, \$1.00."

The Commonwealth offered testimony to show that the warrant was duly issued and committed to Warren for service; that the defendant, not having been arrested, went with the complainant McLaney to the magistrate, and desired to settle the matter; that the magistrate told them he had not the complaint and warrant in his possession, but would get them, and that if the complainant would acknowledge that he had received satisfaction for the civil injury, and the defendant would plead guilty to the

complaint and pay the costs, he would consent to suspend the case; that the magistrate thereafter saw the officer and told him to make up his costs, and the officer then made the above indorsement; that Moran never came before the magistrate, nor pleaded guilty, nor paid the costs, and the magistrate returned the warrant to Warren for service, and directed him to arrest the defendant; that Warren delivered the warrant to Packard for service; and that the defendant was not arrested, nor in the custody or presence of Warren, before the homicide.

The defendant objected to the admission in evidence of the warrant and of this testimony; but the court admitted them, and ruled that, upon the evidence, "it appearing that the warrant had never been served, and the magistrate never having had Moran before him upon it judicially, and the warrant having been returned by the magistrate to Warren for service, it was valid in the hands of Packard sufficiently to authorize him to arrest the defendant upon it, and take him before the magistrate."

The jury found the defendant guilty of murder in the second degree, and he alleged exceptions.

*P. R. Guiney, (E. C. Bumpus with him,)* for the defendant.

1. The return of an officer on a criminal warrant cannot be contradicted, any more than his return on a civil process. If the parol evidence to contradict this return was erroneously admitted, the fact that it showed that there was no arrest of the defendant is immaterial. In a capital case, any error is to be presumed prejudicial to the defendant; and there was obvious injury here, for the ruling admitting the evidence was decisive of the character of the offence as murder and not manslaughter. It is an underestimate of the character of a return, to call it a merely ministerial act. It is an executive act, done under sanction of an oath and in obedience to a judicial order.

2. The authority of the officer must appear on the face of his precept; and a want of authority was plainly apparent here, for the warrant appeared on its face to have been already served and returned. The object of the Gen. Sts. c. 158, § 1, in compelling the officer to exhibit his precept, is to satisfy the person whom he seeks to arrest of his authority; but if he may appeal from the

precept to facts or supposed facts behind it, the exhibition of it is a mere mockery.

3. There was no right to reissue the warrant when once returned; and if there was, the new direction for its service was unlawful for being oral; and even if lawful, it was personal to Warren and could not be delegated by him to Packard.

4. There was an adjustment of the suit, and thereby an end put to the warrant.

5. If there was any occasion to bring the defendant again before the magistrate, the way was by the issue of a new warrant.

*C. Allen*, Attorney General, (*A. French*, District Attorney, with him,) for the Commonwealth.

GRAY, J.\* This is an indictment for the murder of Charles M. Packard, a constable of Stoughton, at Stoughton in the county of Norfolk, on the 15th of September 1870, while attempting to arrest the defendant upon a warrant issued on the 9th of August 1870, by a trial justice for the county of Norfolk, addressed to the sheriff of the county, or his deputy, or any constable or police officer of any town in that county, and directing them respectively to take the defendant and bring him before said trial justice to answer to a complaint for an assault.

This warrant was upon its face sufficient authority to Packard to arrest the defendant, unless the memorandum indorsed thereon, signed by a deputy of the sheriff of the county, dated September 12, 1870, and stating that by virtue thereof he had arrested the defendant and had him before said trial justice for examination, must be treated as conclusive evidence that no further service of the warrant could lawfully be made.

Assuming that the rule, that an officer's return upon a warrant cannot be contradicted by parol evidence, is applicable to such a return, when the warrant is produced in evidence upon the trial of an indictment for the homicide of an officer while attempting to make a subsequent arrest upon the warrant — we are all of opinion that the indorsement in question is not such a return.

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\* This case was argued in June, before all the judges except MORTON, J



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Commonwealth v. Moran.

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It was not shown by any record of the magistrate, nor by any minute made by him, upon the warrant or otherwise, that the warrant had been returned to him. It was not produced by him nor from his files. But it was at the time of the homicide in the hands of the officer with the murder of whom the defendant is charged.

Until the warrant had been returned to the magistrate, any memorandum made thereon by an officer had not the character of a record, but might be amended or erased by the officer who made it, at his pleasure, and would not preclude him from making a further service and return of the warrant; and any other officer to whom the warrant was directed and committed had equal authority to serve and return it, and was no more concluded than the first officer by a memorandum which had never acquired the effect of a return.

Parol evidence being required to give the indorsement the character of a return, it was competent for the Commonwealth to prove by like evidence the proceedings before the magistrate relating to the making of the memorandum on the back of the warrant, as explaining the circumstances under which that memorandum was made; and also the fact that the defendant was never brought before the magistrate upon the warrant.

The evidence offered by the Commonwealth was therefore rightly admitted; and it was rightly ruled that, if it appeared that the warrant had never been served, and the magistrate had never had the defendant before him judicially, and the warrant had been given back by the magistrate to the officer for service, it was so far valid in the hands of Packard as to authorize him to arrest the defendant upon it and take him before the magistrate.

The defendant has therefore no just ground of exception to the rulings at the trial, and must be

*Sentenced, according to the verdict.*

**CASES**

**ARGUED AND DETERMINED**

**IN THE**

**SUPREME JUDICIAL COURT,**

**FOR THE**

**COUNTY OF BERKSHIRE, SEPTEMBER TERM 1871,**

**AT PITTSFIELD.**

**PRESENT:**

HON. REUBEN A. CHAPMAN, CHIEF JUSTICE.	
HON. HORACE GRAY, JR.,	}
HON. SETH AMES,	
HON. MARCUS MORTON,	
	<b>JUSTICES.</b>

**COMMONWEALTH vs. ROBERT DOUGHERTY.**

**SAME vs. SAME.**

**T**he sexton of a church building, who is charged with the care of it and the duty of conducting funerals therein, may lawfully remove from it an undertaker, who, after being warned to desist and leave, persists in conducting a funeral there in violation of rules prescribed by the authorities of the church to maintain order and prevent interference with other religious exercises.

**A** rule of a Roman Catholic burial ground prohibited undertakers from officiating at funerals there without appointment of the pastor of the church, who held the fee in the land. An undertaker officiated at a funeral there in violation of the rule, and as he was rising from his knees, at the end of the service, the keeper of the burial ground, who had charge, by another rule, of all gatherings of persons in it, struck him on the shoulder, reminded him of the rule and that he had been expressly forbidden by the pastor to conduct a funeral there, and forbade his proceedings. Upon a complaint against the keeper for an assault and battery consisting in the blow, the jury found him guilty. *Held*, that this court could not hold, as matter of law that the finding was not warranted by the facts.

TWO COMPLAINTS to the district court of central Berkshire, for assault and battery of John McCarthy; the first offence averred to have been committed in a church building, and the second in a burial ground. The defendant was found guilty on both, and appealed. At the trial of the first complaint, in the superior court, on the appeal, before *Reed, J.*, there was evidence of these facts:

The defendant was sexton of the Roman Catholic church building in Pittsfield, and in that capacity had charge of the building and of the conduct of funerals in it. He was also an undertaker. It was the rule concerning funerals in the building, that the priest or the sexton should be informed of the death, and of the desire of the friends of the deceased that funeral services should be performed there; upon receiving such notice, either the priest or the sexton would fix a time for such services, to avoid interference with the other exercises of the church; and it was the sexton's duty to take charge of the funeral procession, when it reached the door of the building, and to precede the bearers of the corpse up the aisle, superintend the deposit of the bier in the place provided for it, seat the mourners, and then, if the priest was not present, call him.

On Sunday, May 17, 1870, at the close of a religious service in the building, and after the congregation had been dismissed, but while some of them were lingering at prayer within the building, John McCarthy, an undertaker who had recently set up in business in Pittsfield, came to the building in charge of a funeral of which no previous notice had been given, and attempted to enter and perform the duties of the sexton in regard to it. Upon McCarthy's arrival at the vestibule, the defendant, who was seated at a desk within the door, forbade him to proceed with the funeral in the building. But McCarthy persisted in his attempt, marched up the aisle with his procession, and was directing one Tim Powers where to put the bier, when the defendant "came down the aisle, and told him to go out of the church, and forcibly removed him, but without more force than was necessary to eject him from the building."

Upon these facts the defendant requested a ruling that he was entitled to an acquittal, which the judge refused, whereupon by

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*Commonwealth v. Dougherty.*

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consent of the defendant a verdict of guilty was returned and the case reported for the revision of this court.

*T. P. Pingree & J. M. Barker*, for the defendant. The facts justify the defendant. As sexton in charge, it was his duty to keep order in the building, and enforce the rules established for its use and for the government of persons entering it. No license is shown authorizing any person to enter or remain in it except on compliance with the rules. McCarthy entered in violation of them, not as a mourner or worshipper, but in the exercise of his trade, and persisted in remaining and violating them after he had been forbidden and been told to leave. It then became the defendant's duty to remove him, and he performed it without unnecessary force.

Any person lawfully in possession of a building, for himself or as the agent or servant of the owner, may, after requesting a stranger to withdraw from the premises, use force to remove him, if he neglects or refuses to leave. *Commonwealth v. Clark*, 2 Met. 23, 25. *Commonwealth v. Power*, 7 Met. 596. Com. Dig. Pleader, 3 M. 16, 17. *Weaver v. Bush*, 8 T. R. 78. Even if the premises are *quasi* public in their nature, the person in charge will be justified in removing therefrom by force any one who fails to conform to the reasonable rules of the place, persists in violating them after notice, and refuses to leave upon request. *Commonwealth v. Power*, 7 Met. 596. And it is a complete justification for an assault, to show that the defendant did the acts complained of in removing one who was disturbing a parson conducting a funeral or religious meeting. Com. Dig. Pleader, 3 M. 17. It seems that, by the common law, any person might lawfully use force to remove one who was disturbing a funeral or religious ceremony, or exercising his trade in a church building. *Glever v. Hynde*, 1 Mod. 168.

It is evident from the report, that the defendant was acting in what seemed to be the duty of his position, and not merely undertaking to assert his own rights; and therefore that the main element of crime, an unlawful intent, was wanting. *Commonwealth v. Presby*, 14 Gray, 65. *Commonwealth v. Rigney*, 4 Allen, 316.

*C. Allen*, Attorney General, for the Commonwealth. The defendant forcibly ejected from a church building one who was conducting a funeral therein. This constituted an assault and battery, unless there was a justification for it. It was also a criminal act at common law, as disturbing an assembly for the burial of the dead. 1 Bishop Crim. Law (4th ed.) § 982. And it was in violation of the statute against wilfully interrupting or in any way disturbing a funeral assembly or procession. Gen. Sts. c. 165, § 24. It is certainly a great aggravation of the offence of assault and battery, if it is committed at a funeral, where mourners for the deceased are affected by it. The assembled congregation cannot be supposed to have investigated the respective rights of rival undertakers. Accordingly, in such a case, an assault upon any one is a grave offence, and is not excused by a prior assault by him upon the defendant. 1 Russell on Crimes (4th ed.) 416. *A fortiori*, an assault upon one who is actually conducting a funeral must be so shocking to the mourners and congregation as hardly to admit of excuse.

In the present case, nothing is open to the defendant, except to urge that, on the facts recited in the report, there was no aspect of the case in which the jury could properly return a verdict of guilty. And upon those facts the following considerations are submitted, for the Commonwealth :

1. Being in charge of a church building does not authorize a sexton to determine whether a funeral shall be held there or not. The sexton's authority, as such, does not relate to matters of this kind, but rather to the care of the building as to sweeping, dusting, warming and lighting. There is nothing reported in this case, and nothing in the manners, usages or traditions of the people of Massachusetts, or in the known rules of the Roman Catholic Church, which gives a sexton, as such, the right to forbid funeral services for a church member from being conducted in the church building where he worshipped.

2. It is said that this sexton had the conduct and charge of funerals in the building. This may mean that he usually had, or that he had whenever he was called upon. It does not mean that he had an exclusive right to conduct the funerals there. It

is also said that "the rule was" for previous notice of funerals to be given; but it does not appear what was to be done if this rule was not complied with. There is nothing to show that, in such an event, the sexton might interrupt, disturb and put an end to the funeral. If this rule is violated, is the sexton thereupon at liberty to break in upon the funeral with a brawl; or should he more properly report the facts to the priest? Who has the authority to dispense with this rule, or to decide what is to be done if it is not complied with? In what system of church discipline is it provided that this authority resides in the sexton?

3. It is said that, on the arrival of the funeral procession at the church, it was "the duty" of the defendant to take charge of it. This means, it was his duty if called upon to do so. The duty was imposed upon him for the benefit of the mourners, not as a means of annoyance to them. They had a right to his services; or they might dispense with them. But he had not the exclusive privilege of walking at the head of the funeral procession, against the wishes of the mourners.

4. No question arises in this case as to the authority of the priest; nor is it to be assumed that he sanctioned or knew of the proceedings of the defendant. The priest may have been willing and ready to conduct the religious exercises.

5. In any reasonable aspect of the case, the facts fail to show any necessity for removing McCarthy from the building. Can the court perceive, as matter of law, that this necessity existed? On the other hand, so far as appears, even assuming that McCarthy was properly deprived by his rival undertaker of the opportunity of conducting the obsequies, yet the melancholy satisfaction of witnessing them might safely have been conceded to him.

MORTON, J. It appeared at the trial, that the defendant was the sexton and person in charge of the church, and that it was his duty to take charge of and conduct funerals at the church. The complainant McCarthy had no right to insist upon conducting a funeral there in violation of the rules prescribed by the authorities of the church to maintain order and prevent interference with other religious exercises. The facts show that he did so,

and that, upon being requested to desist and leave the church, he refused, and persisted in his unauthorized intrusion. We think the defendant, being in charge of the church, upon such refusal, had a right to remove him; and as the facts find that in so doing he used no more force than was necessary, he was not guilty of an assault and battery. The jury should have been instructed, as requested by the defendant, that upon the facts shown at the trial he was entitled to an acquittal. *Verdict set aside.*

At the trial of the second complaint, in the superior court, also before *Reed, J.*, the following facts appeared :

The fee of the Roman Catholic burial ground in Pittsfield was in Edward H. Purcell, the pastor of the church of St. Joseph in Pittsfield; and he had established certain rules for its use, the tenth and eleventh of which were as follows :

“ *Tenth.* The conduct and charge of all funeral processions and gatherings of persons in and upon the grounds of said cemetery shall be in the person appointed for that purpose by the pastor of the church of St. Joseph in Pittsfield, and strict obedience to his requirements is demanded and will be enforced.

“ *Eleventh.* Undertakers, and all other persons having charge of a funeral or burial, before entering upon the cemetery grounds, will notify the person in charge of the cemetery of the time such burial will occur. In the cemetery all arrangements therefor will be made, and the charge of such funeral received at the entrance of said cemetery, and no undertaker or other person than the pastor or his appointees will be permitted to officiate in any way or matter upon the grounds.”

The defendant was the person appointed by Father Purcell under the tenth rule, and had charge of the burial ground.

Licenses for lots were granted by Father Purcell in a form certifying that the licensee was entitled to the use of one burial lot of specified dimensions, subject to the rules for the use of the burial ground, and on condition that persons dying drunk or unbaptized, or otherwise opposed to the Catholic Church in the opinion of the Roman Catholic bishop of Boston, should not be entitled to observance of the license.

At the funeral (described in the first case) which the undertaker McCarthy was conducting, he "entered the burial ground with the corpse, under this usual license, and there conducted the funeral ceremonies, and, as is usual on such occasions with Roman Catholics, gave thanks and made prayers at the close." As McCarthy was rising from his knees and putting on his hat, the defendant, "coming up to object to his presence and actions in conducting the funeral on the cemetery grounds, struck him upon the shoulder, and objecting that he was not permitted to go there as undertaker with a funeral, and that Father Purcell had previously thereto forbidden him to take charge of a funeral at the cemetery, refused to permit him to officiate thereat in the cemetery."

Upon these facts (as in the first case) the defendant requested, and the judge refused, a ruling that the defendant was entitled to an acquittal; whereupon by consent of the defendant a verdict of guilty was returned and the case reported to this court.

*T. P. Pingree & J. M. Barker*, for the defendant. The license, under which alone the funeral was allowed in the burial ground, was given subject to rules which were broken by McCarthy's presence and conduct up to the time of the defendant's act. McCarthy knew the rules and was deliberately violating them; for he had been expressly forbidden by Father Purcell to take charge of a funeral at the cemetery. He must therefore be considered as a trespasser persisting in the trespass after having been forbidden by the owner. The defendant, therefore, as the person in charge of the grounds and bound to enforce the rules, was justified in removing him from the cemetery by force. See cases cited in argument in the first case.

The report finds that the defendant's intention in coming up to McCarthy was to object to his presence and actions. The striking upon the shoulder does not appear to have been anything more than was necessary to attract his attention; and it is a fair inference that it was but the beginning of a justifiable attempt to remove him from the grounds. Whether the defendant then desisted of his own accord, or was overpowered or prevented by bystanders, is immaterial. The decisive question is, whether the



blow was disproportionate or unnecessary, considering the object to be effected. The burden is upon the Commonwealth to show that it was so; and there is nothing from which such an inference can be drawn.

If it is urged that no request to leave is shown, previous to the blow, it is to be considered that a previous request is unnecessary in some circumstances, as where a man enters *vi et armis*, or breaks in at a gate; *Green v. Goddard*, 1 Salk. 641; and that McCarthy's entry, having been forbidden, was wilful, and would justify his removal without such a request.

If the facts do not demonstrate the absence of an unlawful intent on the part of the defendant, they at least put the question in so much doubt that the Commonwealth cannot be said to have sustained the burden of proof required to entitle the verdict to stand.

*C. Allen*, Attorney General, for the Commonwealth. The defendant struck McCarthy at a stage of the proceedings at which there was no excuse for using personal violence. Any discussion of the defendant's rights and privileges in the conduct of funerals in the burial ground, in instances in which he asserts them seasonably, is therefore needless.

MORTON, J. We cannot say, as matter of law, that the verdict of the jury was erroneous. It appeared at the trial, that, after McCarthy had concluded the funeral services, the defendant struck him on the shoulder. It does not appear that this was for the purpose of removing him from the cemetery. If it be admitted that the defendant had the right to remove McCarthy, it does not follow that this assault was justifiable. It was for the jury to decide whether the force used by the defendant was used for the purpose of removing him, and whether it was reasonable in kind and degree. Both of these questions were within the province of the jury to determine, and we cannot revise their finding thereon.

*Judgment on the verdict.*

## ANDREWS HALL vs. THOMAS CORCORAN &amp; another.

A person who hires a horse of its owner to drive to a particular place, and drives it to another place, is liable in tort for the conversion of the horse, although the contract of hiring was made on the Lord's day, and, as both parties knew, for pleasure only and therefore illegal and void.

TORT. The declaration alleged that the defendants hired the plaintiff's horse and sleigh to drive from South Adams to North Adams and back in a prudent, careful and proper manner, and drove the same beyond North Adams to Clarksburg wrongfully, and managed and drove the horse so improperly, unskilfully and wrongfully on their return from Clarksburg to North Adams that the horse ran with the sleigh, and broke the sleigh and injured itself. The answer denied all the allegations of the declaration; and alleged that, if the defendants ever hired a horse and sleigh of the plaintiff, they never drove them farther than was agreed between the parties, and that the hiring and driving were on the Lord's day, and not a work of necessity or charity, as the plaintiff well knew.

At the trial in the superior court, before *Devens, J.*, the plaintiff testified that he let his horse and sleigh to the defendants to drive to North Adams and back to South Adams, and that he never at any time authorized them to drive the same from North Adams to Clarksburg. Upon cross-examination, he testified that he let the horse and sleigh to the defendants, and received two dollars in payment therefor, on a Sunday.

Another witness called by the plaintiff testified that he saw the defendants with the plaintiff's horse and sleigh in North Adams village, the sleigh greatly damaged and the horse considerably injured by cuts and scratches on its legs: and that the defendants then told him that they had been with the horse and sleigh beyond North Adams to Clarksburg, a distance of two miles or more, and that on the way back from Clarksburg to North Adams the horse became unmanageable, and they tipped over and the horse ran away with the sleigh and caused the injuries. Upon cross-examination, he testified that this was on Sunday.

The plaintiff introduced evidence as to the amount and nature of the injuries to the horse and sleigh ; and also evidence tending to show that the horse was safe and kind to drive, and the sleigh nearly new, when the defendants hired them ; and rested his case.

The defendants admitted that the horse and sleigh were hired by them to drive only from South Adams to North Adams and back to South Adams ; and testified that the hiring was on Sunday, that they drove the horse and sleigh beyond North Adams to Clarksburg, and that the injury to the horse and sleigh occurred while on their return from Clarksburg to North Adams, substantially as hereinbefore stated.

There was conflicting evidence upon the question whether the plaintiff, at the time of letting the horse and sleigh, knew for what purpose the defendants were going with them to North Adams ; and to settle this point, the judge submitted to the jury this question : " Was the plaintiff aware that the horse and sleigh were hired for pleasure travel ? " and the jury answered : " He was."

The judge then ruled, upon the whole evidence and this answer of the jury, that the plaintiff could not maintain the action ; and instructed the jury to return a general verdict for the defendants, which was done, and the plaintiff alleged exceptions.

*A. J. Waterman*, for the plaintiff.

*M. Wilcox & S. W. Bowerman*, for the defendants.

GRAY, J. This bill of exceptions presents the question whether the owner of a horse, who lets it on the Lord's day to be driven for pleasure to a particular place, can maintain an action of tort against the hirer for driving it to a different place, and, in doing so, injuring it. At the trial in the superior court, it was ruled that he could not, and that ruling was in accordance with the decision of this court in *Gregg v. Wyman*, 4 Cush. 322. The only case, known to us, in which that decision has been followed, is *Whelden v. Chappel*, 8 R. I. 230. And the highest courts of New Hampshire and Maine, in able and well considered judgments, delivered upon precisely similar cases, have come to the opposite result. *Woodman v. Hubbard*, 5 Foster, 67. *Morton v. Gloster*, 46 Maine, 420. The respect due to the opinions of

those courts, and to the doubts which have always been entertained by the bar of this Commonwealth of the correctness of the decision in *Gregg v. Wyman*, has induced us to reconsider the question; and upon full consideration we are unanimously of opinion that it was erroneous and must be overruled.

The general principle is undoubted, that courts of justice will not assist a person who has participated in a transaction forbidden by statute to assert rights growing out of it, or to relieve himself from the consequences of his own illegal act. Whether the form of the action is in contract or in tort, the test in each case is, whether, when all the facts are disclosed, the action appears to be founded in a violation of law, in which the plaintiff has taken part. We have had occasion, while the present case has been under advisement, to consider this test as applied to actions upon contracts made on the Lord's day. *Cranson v. Goss*, *post*, 439. And our books afford several illustrations of its application to actions of tort.

A person, for instance, who travels on Sunday in violation of the Lord's day act, cannot maintain an action against a town for a defect in the highway, or against the proprietors of a street railway, in whose cars he is a passenger, for an injury to himself from their negligence, because his own fault in illegally travelling on the Lord's day necessarily contributes to the injury. *Bosworth v. Swansea*, 10 Met. 363. *Jones v. Andover*, 10 Allen, 18. *Stanton v. Metropolitan Railway Co.* 14 Allen, 485. So no action can be maintained for a deceit practised in an exchange of horses on the Lord's day, because the plaintiff cannot prove the deceit without showing the terms of the illegal contract in which he participated. *Robeson v. French*, 12 Met. 24.

But the fact that the owner of property has acted or is acting unlawfully with regard to it is no bar to a suit by him against a wrongdoer, to whose wrongful act the plaintiff's own illegal conduct has not contributed. Thus an action lies against one who takes and appropriates to his own use property kept by the plaintiff in violation of a statute and therefore liable to be destroyed. *Cummings v. Perham*, 1 Met. 555. *Ewings v. Walker*, 9 Gray, 95.

The judgment in *Gregg v. Wyman* is based upon two propositions: 1st. That the action, though in form tort, yet was essentially founded on a violation by the defendants of the contract of letting, in driving the horse beyond the place specified in that contract. 2d. That if the action was not to be considered as founded on the contract, still, to make the defendants wrongdoers, it was necessary for the plaintiff to show his own illegal act in letting the horse. But, with the greatest deference to the opinion of our predecessors who concurred in that decision, we are constrained to say that we do not think that either of those propositions can be maintained.

An action of tort for the conversion of personal property, under our practice act, is governed by the same rules of evidence as an action of trover at common law. *Robinson v. Austin*, 2 Gray, 564. *Spooner v. Holmes*, 102 Mass. 508. In trover, it was immaterial how the defendant became possessed of the goods; the very form of the action assumed that he had come into lawful possession of them by finding, and had since converted them to his own use; the gist of the action was the conversion; and the general issue was not guilty. If the owner of cattle lent them to another to plough his land, and the bailee killed them, he was liable in trover. Co. Lit. 57 a. The riding or driving of a horse without the owner's leave, being an unlawful intermeddling with the property of another for the benefit of the person using it, was a conversion, for which trover would lie, whether he took the horse from the owner's stable, or acquired possession of it lawfully, as by a contract with the owner to drive it to a different place, or by finding in a highway. *Countess of Rutland's case*, 1 Rol. Ab. 5. *Mulgrave v. Ogden*, Cro. Eliz. 219. *Bagshaw v. Goward*, Cro. Jac. 147, 148. Doderidge, J., in *Isaack v. Clark*, 2 Bulst. 306, 309. Holt, C. J., in *Baldwin v. Cole*, 6 Mod. 212. Bayley, J., in *Keyworth v. Hill*, 3 B. & Ald. 685, 687.

One who converted to his own use, or to that of a third person, goods intrusted to him by the owner, has been held responsible therefor in trover, although by reason of his infancy he was held not to be liable to an action for a breach of the contract under which the goods were put into his hands. *Furnes v. Smith*, 1

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Vol. Ab. 530. *Vasse v. Smith*, 6 Cranch, 226, 231. *Campbell v. Stakes*, 2 Wend. 137, 144. *Fitts v. Hall*, 9 N. H. 441. It was accordingly held in *Towne v. Wiley*, 23 Verm. 355, that an infant who hired a horse from the owner to drive to a particular place and back, and drove it to that place, but returned by a circuitous route, nearly doubling the distance, and stopped over night on the way, leaving the horse without food or shelter, by reason of which it died soon after being returned to the owner, was liable in trover; and Mr. Justice Redfield, in delivering judgment, said: "So long as the defendant kept within the terms of his bailment, his infancy was a protection to him, whether he neglected to take proper care of the horse, or to drive him moderately. But when he departs from the object of the bailment, it amounts to a conversion of the property, and he is liable as much as if he had taken the horse in the first instance without permission." And in *Lewis v. Littlefield*, 15 Maine, 233, it was held that an infant, in whose hands money had been put by the plaintiff to abide the result of an illegal wager, and who paid it to the winner after notice from the plaintiff not to do so, was liable to him in trover.

It is not necessary to consider whether the liability of the infant for his wrongful acts has or has not been too much restricted in some of these cases; the material point is, that the objection that the action was founded on the contract by which he originally acquired possession of the property was held inapplicable to the action of trover. And the distinction between an action for misusing a horse in violation of the contract of letting, and an action for the conversion of the horse by driving it to a place without the contract, is clearly marked in the early cases in this court, in which, while the old rules of pleading prevailed, it was decided that an action for driving the horse beyond the distance agreed might be in trover, without regard to the question whether the horse had been misused; and that an action for immoderately driving the horse upon a journey authorized or assented to by the owner must be in case for the misfeasance, and not in trover for a conversion. *Wheelock v. Wheelwright*, 5 Mass. 104. *Homer v. Thwing*, 3 Pick. 492. *Rotch v. Hawes*, 12 Pick. 136. See also *Lucas v. Trumbull*, 15 Gray, 306.

It therefore appears to us to be clear, upon principle and authority, that an action of tort for the conversion of the horse, by driving it beyond the place agreed in the illegal contract of letting and hiring, is not founded on that contract. And we think it is equally clear that that contract need not be shown by the plaintiff, and forms no part of his cause of action.

The general doctrine was well stated by Chief Justice Parker in *Dwight v. Brewster*, 1 Pick. 50, 55 : " The principle settled is, that a party to an unlawful contract shall not receive the aid of the law to enforce that contract, or to compensate him for the breach of it. It is not easy however to discern how a party to such contract, who becomes possessed of the property of the other party, with which he is to do something which the law prohibits, can acquire a right to that property. The contract being void, the property is not changed, if it remains in the hands of him to whom it is committed. If he has executed the contract with it, or it has become forfeited by judicial process, or if stolen or lost without his fault, he may defend himself against any demand of the owner in ordinary cases ; but if he has it in his possession, he must be liable for the value of it ; so that in an action of trover, with proper evidence of a conversion, the plaintiff would undoubtedly prevail."

The plaintiff in the present case delivered his horse to the defendants for the special purpose of being driven from South Adams to North Adams and back. He did not thereby give up his general property in the horse, or the right to bring an action for any injury to that property, to which, when all the facts are disclosed, it does not appear that any illegal act on his own part contributed. It is true that he delivered possession of the horse to the defendants for an illegal purpose, and that he might not maintain any action against them for an injury done to the horse in driving it in the execution of that purpose to the place agreed on, because the law will not assist him either to break or to enforce his illegal agreement. But that illegal purpose, and the only illegal purpose which was contemplated by the contract, or in which he participated, was the driving of the horse for pleasure to North Adams and back. The plaintiff's general prop-

erty in the horse was not derived from the illegal contract, nor defeated by it. The wrong committed by the defendants, for which they are now sued, was not, as we have already seen, a breach of the illegal contract by which he put his property into their hands; nor is the ground of this action an abuse of the possession which they had thus acquired by his consent; but it is a direct invasion of the plaintiff's general right of property, wholly outside of any contract between the parties, by the wrongful driving of the horse between North Adams and Clarksburg, and thus assuming control of the property for their own benefit, without any authority or license from the owner. This wrong is not varied in nature, or lessened in degree, by the fact that they had originally acquired possession of the horse with his consent; for it consisted in the wrongful use of his horse in driving it beyond North Adams; and that, as is fully established by the authorities already cited, was equally a conversion for which an action of tort in the nature of trover would lie, even if the defendants had previously come into possession of the horse lawfully, under a contract with the owner for another and distinct purpose, or by finding it in the highway at North Adams. Proof of the contract under which the horse was delivered by the plaintiff to the defendants showed indeed that the driving of the horse beyond North Adams was not within its terms or object; but the only legitimate inference from that fact is, that it is wholly immaterial whether such a contract was ever made, or, if once made, whether it had been terminated by mutual assent of the parties or by the wrongful act of the defendants. In short, the defendants' liability for the injury done by them to the plaintiff's property is not affected by the question whether the contract between the parties was valid or void in law, or whether there was or was not any such contract in fact. That contract need not therefore be shown by the plaintiff; and if proved by the defendants, by cross-examination of the plaintiff's witnesses or otherwise, it has nothing to do with the plaintiff's cause of action against the defendants.

The case of *Duffy v. Gorman*, 10 Cush. 45, adds nothing to the weight of *Gregg v. Wyman*. Duffy had delivered goods to Dona-



hoe, a pedler, for the purpose of being unlawfully sold without license, and brought trover against Gorman, to whom Donahoe had pledged them as security for a debt of his own. The court, without discussion of principles or authorities, gave this *per curiam* opinion: "As the plaintiff can claim only through his own illegal contract with Donahoe, which the law will not allow, this action cannot be maintained." Those goods had been delivered by the plaintiff to the other party to the contract, not merely to be used for a purpose which would leave the general property in them in the plaintiff, but for the purpose of absolutely disposing of that property in violation of law; and the case might perhaps be considered as falling within that class mentioned by Mr. Justice Perley in 5 Foster, 69, as distinguishable from the present, "where the property is intrusted to another to be wholly devoted and appropriated to an illegal purpose."

In the later cases in this Commonwealth, *Gregg v. Wyman* has been cited only for the general principle that no action will lie, in which the plaintiff requires aid from an illegal transaction or agreement to which he was himself a party; and the court did not consider or have occasion to consider whether the facts of that case brought it within the proper application of the principle.

In *Welch v. Wesson*, 6 Gray, 505, it was held that one of two persons, engaged in trotting their horses against each other for money in violation of a statute, might maintain an action against the other for wilfully running him down; because, as was pointed out in the opinion, the plaintiff, in order to maintain his action, had no occasion to show that he was engaged in any unlawful pursuit at the time of the injury to his property, or that he had previously made any illegal contract, or what the terms of that contract were; and neither the contract nor the race between the parties appeared to have had anything to do with the trespass committed by the defendant upon the property of the plaintiff.

In *Way v. Foster*, 1 Allen, 408, the present chief justice said that it must be admitted that *Gregg v. Wyman* carried the doctrine to its extreme limit; and referred to *Welch v. Wesson* with approval; and the action which the court in *Way v. Foster* declined to sustain was an action for immoderately driving a horse upon

the very journey which the plaintiff had knowingly delivered it to the defendants for the purpose of being illegally driven upon. That action, though in form tort, was in substance founded upon a breach of the contract by which the defendant had obtained possession of the horse. To such a case the argument of Mr. Justice Fletcher in *Gregg v. Wyman*, that the question whether the injury sued for was a wrong to the plaintiff depended upon the terms of the contract between the parties, might with more reason be applied.

In *King v. Green*, 6 Allen, 139, it was held that one, who had on the Lord's day delivered a chattel in pledge to secure the payment of the hire of a horse for illegal travel on that day, could not, upon a subsequent demand and refusal of the chattel, maintain an action for its conversion, without paying such hire, because, a special property having passed to the defendant by the delivery, the case fell within the maxim *In pari delicto potior est conditio defendentis*. A similar decision had previously been made in *Scarfe v. Morgan*, 4 M. & W. 270. In *Ladd v. Rogers*, 11 Allen, 209, the action was in contract for the price of a horse sold on the Lord's day and kept by the purchaser afterwards; and it was decided that the action could not be maintained on the contract of sale, because that was illegal, and that no contract to pay the value could be implied from the subsequent use of the horse. In *Myers v. Meinrath*, 101 Mass. 366, the only point adjudged was, that where a contract, illegally made on the Lord's day, for the exchange of chattels, had been fully executed by delivery on both sides, the subsequent return of one of the chattels and demand of the other would not sustain an action of tort in the nature of trover for the conversion of the latter. There is nothing, in the decision or opinion in either of these cases, to support the position that the delivery of possession of a chattel on the Lord's day by way of bailment for a special purpose in violation of the statute will prevent the general owner from maintaining an action against the bailee for using the chattel, not under the possession so acquired, but for an entirely different purpose, not contemplated in the illegal contract, and of itself amounting to a conversion.

In *Cox v. Cook*, 14 Allen, 165, a man, who, while unlawfully travelling on the Lord's day, stopped at an inn and left a robe with the innkeeper's servant, was allowed, after demanding it the next morning, to maintain an action of tort against the innkeeper for its conversion; and Chief Justice Bigelow said: "The claim of the plaintiff to the property did not necessarily require him to show in its support a violation of the Lord's day."

It has been held in several recent cases, that a person who places his wagon in the street in a position prohibited by statute, or by municipal ordinance, may yet maintain an action against another negligently driving against it. *Spofford v. Harlow*, 3 Allen, 176. *Steele v. Burkhardt*, 104 Mass. 59. *Kearns v. Sowden*, Ib. 63 note. In *Steele v. Burkhardt*, the present chief justice said: "It is true generally that, while no person can maintain an action to which he must trace his title through his own breach of the law, yet the fact that he is breaking the law does not leave him remediless for injuries wilfully or carelessly done to him, and to which his own conduct has not contributed."

The necessary conclusion is, that upon the case proved at the trial, if not controlled by other evidence, the defendants were liable for the wrongful conversion of the horse by driving it to a place to which the plaintiff had not agreed that they might drive it. The form of the declaration is peculiar. But it was not demurred to, and no objection to it appears to have been raised at the trial, or was made at the argument. It is in tort, and alleges the horse to have been the plaintiff's property; and although some of its allegations are like those of an action on the case for immoderate driving, it contains a distinct allegation that the defendants wrongfully drove the horse beyond North Adams. It thus alleges all the facts necessary to constitute a conversion of the horse to the defendants' use; and under the Gen. Sts. c. 129, § 2, by which "the substantive facts necessary to constitute the cause of action may be stated with substantial certainty, and without unnecessary verbiage," the mere omission to state the legal conclusion affords no ground for giving judgment against the plaintiff at this stage of the case. *Exceptions sustained.*

## HENRY C. JONES vs. HOUSATONIC RAILROAD COMPANY.

A railroad corporation is liable for injuries sustained by a traveller, driving a horse upon a highway with due care, through a fright of the horse occasioned by a derrick which the corporation maintained projecting over the highway so as naturally to frighten passing animals, although it was maintained for the purpose of loading and unloading freight on the cars.

TORT for injuries sustained by the plaintiff while travelling on a highway in Stockbridge, and alleged to have been caused by the defendants' negligence.

At the trial in the superior court, before *Devens, J.*, the plaintiff introduced evidence tending to show that the defendants' railroad crossed a highway in Stockbridge at a place called Glendale, where they maintained a station; that planks were laid between the rails in the highway, but not across the whole width of it; that the ordinary course of travel upon the highway was over the planks; and that at the defendants' station near the crossing they maintained a derrick for the purpose of loading and unloading freight, which was described in the testimony as "having an upright shaft about twelve feet high, and a horizontal arm about fourteen feet long," and as "so located that the arm might be swung north, and then the freight suspended from it would hang about four feet within the located limits of the highway, but some ten or twelve feet from the travelled track of said road."

The evidence was conflicting as to how far the derrick could be seen by travellers approaching the crossing, upon the highway, from the west. The defendants' testimony tended to show that it was visible for from eight to twelve rods; the plaintiff's, that it could not be seen until the traveller "approached closely hereto."

The plaintiff's evidence tended further to show that he was travelling east upon the highway, with a horse and wagon, towards the crossing, when the horse shied at a box-car, which was standing on the north side of the highway, and partly within it, though not within two or three feet of the planking between the rails; that, shying, the horse turned south, and was then frightened by the derrick, and by a platform-car which was standing

within the highway and upon which the defendants were loading stone from a wagon with the derrick ; that the arm of the derrick was swung to the north, and there was a stone suspended from it at a height of about four feet from the ground and within the highway ; and that the horse " became frightened further at said derrick and stone, and ran away with the plaintiff, causing the injuries complained of."

The judge gave instructions to the jury as to due care on the part of the plaintiff and negligence on the part of the defendants, to which no exceptions were taken ; and the defendants then prayed for the following additional instructions : " The defendants, a railroad corporation, are justified in erecting a derrick on their own land in the manner disclosed by the evidence, to enable them to load and unload freight which as common carriers they are bound to receive and transport ; and if the arm of the derrick, in its use, swings with its load over the highway, in loading or unloading the defendants' cars, it is a lawful use by the defendants of the highway, and the derrick, such as is disclosed by the evidence, is an instrument or structure which the defendants in their business have a right to have and use as a reasonable and proper instrument or structure in conducting their business. And if the plaintiff's horse became frightened at the derrick and its load, whilst in use by the defendants in the conduct of their business as a railroad corporation, the defendants are not answerable to the plaintiff therefor."

The judge declined to give these instructions, and instructed the jury in reference to the subject of them as follows : " The defendants were not necessarily negligent by loading their cars in the located (not travelled) limits of the highway ; but if for this purpose they at any time use such limits, they must do it so as not to interfere with the lawful use of the highway by others. They are not entitled to place or maintain structures in it, or extending into it, the effect of which would naturally be to alarm the animals used thereon ; and if they do, and injury results therefrom to parties using due care, they must be held responsible." The jury returned a verdict for the plaintiff, and the defendants alleged exceptions.

*J. Dewey, Jr.*, for the defendants. Upon the facts stated in the bill of exceptions, as to the derrick and the use of it at the time of the accident, it was a question for the court whether the structure and its use were justifiable, and the instructions requested by the defendants should have been given.

In the instructions which were substituted for those requested, the defendants were held to too strict responsibility in regard to their use of any part of the highway, in this, that they were limited to such a use of it as not to "interfere" (that is to say, not to interfere in any degree) with the lawful use of it by others; whereas they are not liable unless they unreasonably interfere with such use of it by others. *Gahagan v. Boston & Lowell Railroad Co.* 1 Allen, 187, 188. *Shaw v. Boston & Worcester Railroad Co.* 8 Gray, 66, 67, 78, 79. See also St. 1871, c. 83, and *Shearman & Redfield on Negligence*, § 367.

If the defendants may lawfully use and occupy the highway with their cars and engines, for a reasonable time in prosecuting their business, they may in like manner during the same time employ any other instrument or structure necessary or convenient in its prosecution, though such as naturally to alarm animals driven on the highway. *Shep. Touchst.* 89, § 1. *Darcy v. Askwith*, Hob. 234. *Price v. Braham*, Vaugh. 106, 109.

*S. W. Bowerman*, for the plaintiff. Railroad corporations are not justified in locating freight depots so near highways that the loading and unloading of freight may in any manner obstruct or endanger public travel. *Redfield on Railways* (4th ed.) § 226, *cl.* 7, and cases cited in note. They have no right in a highway except the right of transit, and are liable to fine if they obstruct travel by leaving engines or cars within its limits. *Gen. Sts.* c. 63, § 68. Any machine or structure erected by a railroad corporation within the limits of a highway, or extending into the highway when used, naturally adapted to frighten horses lawfully driven on the highway, is a nuisance, and if horses so driven are frightened thereby, and injury results, the corporation is liable. *Congreve v. Smith*, 18 N. Y. 79. *Congreve v. Morgan*, Ib. 84. *Morton v. Moore*, 15 Gray, 573.

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AMES, J. The instructions requested by the defendants were rightfully refused. The right of a railroad corporation to use and occupy a part of the public highway, for the purpose of loading and unloading freight, (if any such right can be said to exist,) must be subordinate to the lawful use of the highway for general purposes of travel. The rule contended for by the defendants would allow them to use machinery and implements within the limits of a highway, such as might naturally frighten horses and in that way endanger travellers who were in the exercise of due care and diligence. *People v. Cunningham*, 1 Denio, 524. *Rez v. Jones*, 3 Camp. 230. The instructions given by the court were correct and appropriate, and met all the exigencies of the case. It was not necessarily a wrongful act for the defendants to load their cars within the located limits of the highway; but "they were not entitled to place or maintain structures in it, or extending into it, the effect of which would naturally be to alarm the animals used thereon," and they are to be held responsible if any injury should result from their doing so, to persons using due care.

*Exceptions overruled.*

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THOMAS M. JUDD *vs.* JAMES M. FARGO.

In an action against the proprietor of a farm adjoining a highway, for damage sustained by a person travelling on the highway with due care, through his horse's taking fright at a sled with some tubs on it, which the defendant had left in the highway, near one of his outbuildings into which he intended to remove the contents of the tubs, the question whether the sled and tubs were a nuisance which rendered the defendant liable depends upon whether they had remained in the highway for an unreasonable time: and upon that issue it is competent for the defendant to prove that the highway was little frequented, particularly at the time of year when the accident occurred; but not that the state of things in the outbuilding was such as to render it convenient for him to leave the sled and tubs in the highway, nor that his neighbors were accustomed to do so under similar circumstances; and the use made of highways by others under such circumstances does not determine his liability.

TORT to recover for the death of the plaintiff's horse, occasioned by taking fright at obstructions which the defendant had put in a highway, and jumping down an embankment in running away from them.

At the trial in the superior court, before *Putnam, J.*, the plaintiff's evidence tended to show that about ten o'clock in the morning of Monday, April 5, 1869, he was travelling, with his horse and sleigh, on a highway in the town of Monterey, which led past the defendant's farm, when he came upon a pile of wood and a sled in the highway; that there were two sap-tubs on the sled, each of them about two and a half feet high and of the capacity of three barrels; that one of the tubs was full of maple-sap and was standing on its bottom, and the other was partly full and was tilted; that the defendant had placed the wood and sled and tubs in the highway, in the position in which they were; and that the plaintiff's horse took fright at the sled and tubs, and ran along the highway about ten rods, and down the embankment, and was killed.

The defendant's evidence tended to show "that one corner of his sap-house was on the line, and the other front corner nine feet back of the line, of the highway; that the wood lay in front of the sap-house, partly on the defendant's land and partly in the highway; that the sled stood in the highway, obliquely to the travelled path, the hind end from two to five feet from the nearest sleigh track, and the wood further from the track than the sled; that some of the wood had been there three or four weeks, and some was thrown upon the pile about ten days before; that the sled, with the tubs thereon, filled with sap, had been drawn and left by the defendant in said position between five and six o'clock on the Saturday afternoon previous, with the intention of transferring the sap from the tubs to tubs and a boiling-pan in the sap-house, but the sled was not unloaded that night; that between five and six o'clock on Monday morning the defendant made his fire and then returned to his house for breakfast, after which he went again to the sap-house, took part of the sap from the hind tub, raised one side of that tub, with the remainder of its contents, so that it stood obliquely inclined towards the sap house, and left it in that position, the other tub standing on its bottom and the sled in the same position as on the previous Saturday evening; that the defendant then started to go to a town meeting, and had walked only a few rods when the accident hap-



pened ; that on Tuesday morning the defendant drew the sled away, but returned it in the course of the day to the same place, and left it standing, with the tubs on it, substantially in the same position ; and that it was customary for him to leave it standing there from time to time in the same way."

The defendant's counsel proposed to prove, in his behalf, "that his tubs in the sap-house were sufficient for ordinary occasions, but that on this Saturday afternoon, by reason of an extraordinary flow of sap, they were filled, which delayed the unloading and removal of the sled ;" and he proposed this question to the defendant, who was examined as a witness : "Were your tubs in the sap-house full on this Saturday night ?" But the offer of proof, and the specific inquiry, were excluded as immaterial.

He also proposed to show "the locality and amount of travel on this highway, for the purpose of showing that it was but little used at any season, and of still less travel at this season of the year." But the evidence was excluded in like manner.

He further asked a witness this question, "What is the use usually made of this highway, and of highways in its vicinity, by others owning land on said highway ?" This inquiry was also excluded as immaterial, the judge stating "that he should instruct the jury that under certain restrictions, and for certain purposes, the defendant had a right to leave wood, sleds and tubs in front of his premises."

The defendant prayed for an instruction to the jury "that the owner of land may make such reasonable use of the highway adjoining his land as is usually made by others similarly situated." The judge declined to adopt this instruction ; and after instructing the jury as to the rights of adjoining proprietors in highways, instructed them further, "that the defendant was guilty of a nuisance, if he unnecessarily and improperly allowed the sled and tubs to remain in the highway ; that he had the right to allow them to be and remain a reasonable time for the purpose of transferring them to and upon his own premises ; that if he allowed them to remain an unreasonable time for such purpose (of which the jury were to judge) it was an unnecessary and improper use of the highway ; that he was bound to remove them as soon as

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he reasonably could, under all the circumstances ; that in this case they might exclude Sunday in considering the question of reasonable time ; that, while he had a right to use the highway temporarily, for such reasonable time and for such purpose, he had no right to occupy it for the purpose of storage ; that in this case the jury were to say whether the defendant's purpose was to store the sled and tubs and wood in the highway for his convenience, or to transfer them in a reasonable time to his own premises ; and that if he allowed them to remain there for storage, or if only for transfer, and a reasonable time for transfer had elapsed, and they were calculated to frighten horses, and did frighten the plaintiff's horse so that it was rendered unmanageable and was killed by reason of such fright, and the plaintiff drove a proper horse and was himself in the exercise of due care, the plaintiff could recover from the defendant the damage he sustained thereby."

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions to the exclusion of evidence, and to the instructions above recited "so far as they are in conflict with the rulings prayed for and refused."

*S. W. Bowerman & J. Branning*, for the defendant.

*M. Wilcox*, for the plaintiff.

AMES, J. Upon the question whether the use which the defendant was making of the public highway adjoining his own land was reasonable, he was entitled to show, if he could, that it was an obscure cross-road, but little frequented by travellers at all seasons, and particularly at the time of year when the accident happened. The rule is laid down in *O'Linda v. Lothrop*, 21 Pick. 292, that, in deciding what may be deemed a proper and reasonable use of a way, public or private, much must depend on the local situation, and much upon public usage. Carriages may stand, and goods may be received, at the door of the adjoining proprietor, although some temporary inconvenience to travellers may thereby be occasioned. All that the law requires in such a case is that the obstruction shall not be continued for an unreasonable length of time. *Commonwealth v. Passmore*, 1 S. & R. 217, 219. *People v. Cunningham*, 1 Denio, 524. The

standing of a carriage, or the delivery of coals or other bulky articles, by the roadside, in a crowded thoroughfare in a populous city, might occasion so great and general an inconvenience that the reasonable time for the removal of the obstruction would allow no delay that could be avoided. The same kind of obstruction, in a country road but little frequented by travellers, might continue for a much longer time without amounting to a substantial or practical obstruction to the public right. The measure of diligence and reasonable time would be different in the two cases. It appears to us therefore that the evidence offered by the defendant as to the amount and frequency of the travel upon that road, so far from being immaterial, was competent and important, and should have been received.

The evidence offered to show that the state of things on the defendant's premises was such as to render it convenient to him to leave the sled, with its load, standing within the limits of the road ; and also that other persons, owning land on this and other roads in the vicinity, were accustomed to do the like ; was properly excluded. It had no tendency to make out the defence. The judge was right also in refusing to rule that the owner of land may make such use of the highway adjoining his land as is usually made by others similarly situated.

The instructions given to the jury do not appear to have been objected to in any other respect. The exclusion of the evidence as to the frequency of travel upon the road, however, renders a new trial necessary, in which the jury must decide whether, under all the circumstances, the defendant at the time of the accident was making a proper and allowable use of the road.

*Exceptions sustained.*

**ELI W. GIDDINGS vs. EDWARD A. PALMER & another.**  
**CHARLES D. PALMER vs. ELI W. GIDDINGS & another.**

A. and B., in dissolving partnership, set off, each to the other, a specific part of the assets of the firm, and each as to the other assumed and agreed to pay a specific part of its liabilities. Among the liabilities assumed by B. was a promissory note due from the firm to his father. But instead of applying his portion of assets to pay this note, B. applied them (with the knowledge of his father that such an application was a violation of the understanding with A.) to pay a debt which he, with his father as surety, was owing individually, and another debt which he was individually owing to his father. And then his father sued A. on the firm's note. *Held*, that the assets of the firm set off to B. were subject to no trust for the payment of the note, which A. could enforce in equity against B. and his father; and that the action on the note could be maintained.

THE FIRST CASE was a bill in equity, filed August 30, 1869, by one of the members of the former firm of Giddings & Palmer, against Edward A. Palmer, the other member thereof, and Charles D. Palmer, his father; praying for a decree to compel the defendants to surrender to a receiver, to be appointed, any and all property in their possession which was assets of the firm, to be by the receiver applied to payment of the firm's debts; and for an injunction to restrain said Charles D. Palmer from further prosecuting

THE SECOND CASE, which was an action of contract begun by him in the superior court May 6, 1867, against said Giddings and Edward A. Palmer, upon a promissory note of the firm of Giddings & Palmer, dated January 10, 1867, for \$1138, payable on demand to the plaintiff, and indorsed with an acknowledgment of the receipt of \$300 on February 12, 1867; in which action Edward A. Palmer was defaulted.

This action was referred to an auditor, and at June term 1869 of the superior court was submitted on his report as a statement of agreed facts. Judgment was ordered thereon for the defendant Giddings, and the plaintiff appealed.

The suit in equity was referred to the same person as master in chancery, who was the auditor in the action at law, and was reserved on the pleadings and his report, by *Colt, J.*, for the determination of the full court. The cases were argued together and the material facts appear in the opinion.

*J. Dewey, Jr.*, for Giddings.

*M. Wilcox*, (*B. Palmer* with him,) for the Palmers.

CHAPMAN, C. J. When a person suffers loss in consequence of giving credit to parties who are insolvent, a court of equity cannot always give him relief. The plaintiff in this suit in equity seems to have suffered from this cause, and it arises partly from his neglect to avail himself of the security which he had in his possession. He asks the court to protect him by injunction against the action now pending against him in favor of Charles D. Palmer on a note for \$1138, given by Giddings & Palmer. The master's report finds that this note was given by Edward A. Palmer without the knowledge of Giddings, but was given for money received and used for the benefit of the copartnership with the knowledge and consent of Giddings. The firm also, with the plaintiff's consent, sold Charles D. Palmer a pair of horses and a wagon for \$300, which sum he indorsed on the note. The plaintiff was thus liable originally for the note, and had recognized its validity afterwards. But he also relies upon other facts as constituting equitable grounds for resisting the collection of the note.

He had been a partner in trade, in 1866, with one Alfred Gardner, carrying on the business of an ordinary country store. In July of that year, the defendant Edward A. Palmer purchased the interest of Gardner in the concern, and became associated with the plaintiff in business, under the firm of Giddings & Palmer. He was the son of Charles D. Palmer, and obtained from him certain securities, which he paid to Gardner, and afterwards exchanged them for a note of \$1000, signed by himself and his father, and payable to Gardner.

About February 1867 Giddings & Palmer sold their stock in trade to one Dyer D. Stannard, with the exception of some small articles, and took of him twelve notes of \$100 each. They were given by Junius P. Adams, and were secured by mortgage and otherwise. The plaintiff then had a right to have these assets, and all the other assets of the firm, applied to the partnership debts; and might have enforced his claim in equity. But instead of protecting himself in that way, he divided the assets with his copartner, each taking a portion of the notes and ac-

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counts, and each at the same time assuming and agreeing with the other to pay certain specified debts then due and owing by the firm. They ceased to do business; and, having divided the assets, were no longer partners, nor had they any partnership property.

Among the assets assigned to Palmer and taken by him, were the Adams notes of \$1200; and among the debts assumed by him was the balance of the \$1138. But the plaintiff parted with his lien upon the Adams notes to pay the debt; and relied upon the promise of his partner to pay this debt, as his partner relied upon his promise to pay other debts. His partner did not take the notes subject to any trust, but by the plaintiff's assignment of them took an absolute property in them; and the plaintiff then parted with his interest in the partnership property, without taking any security, and relying merely on the promise of Palmer to pay his share of the debts, the debt to his father among others.

The court cannot annex a trust to the Adams notes, which the plaintiff neglected to provide for; or rather, a trust which he released. Courts can enforce trusts, but cannot renew them for parties who release them. The effect of the division of the assets was, to give the absolute title to each partner, and to reduce his responsibility to pay his share of the debts to a mere matter of ordinary contract, as to his copartner.

The defendant Charles D. Palmer knew how the parties were situated, and what they had agreed to do; and with his knowledge and assent, his son sold the Adams notes, and, instead of paying his father's note with the avails, paid the note which he and his father had given to Gardner. He also sold some of the assets which had been assigned to him, and applied the avails to the payment of money which his father had advanced to him to pay Gardner. All this was in violation of his contract with the plaintiff, as his father well knew; and it was inequitable in the same sense that it is inequitable for any person to pay money on his unsecured debt, while he is leaving a surety to pay one of his other debts. But the money with which he paid his father was not subject to any trust which the law can enforce.

*Bill dismissed, with costs.*

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*Langdon v. Hughes.*

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In the action at law, the note in suit was the note of Giddings & Palmer. Giddings sold to Edward A. Palmer his interest in the Adams notes and the other notes credited to him by the auditor, and after such sale had no legal right to have them applied on the plaintiff's note. The facts and principles applicable to the case are fully stated in the opinion in the case in equity.

*Judgment for the plaintiff.*

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ADRIAN LANGDON *vs.* JOHN HUGHES.

In an action for the price of goods sold and delivered which is charged on the plaintiff's books of account as due to himself and a third person as partners, it is competent for him to prove that he was sole owner of the goods at the time of their sale, and explain the form of the entry by oral testimony that the books were opened at a time when he was under a conditional agreement to admit the third person as a partner in his business, and that the condition was not fulfilled.

A. sold goods to B. and C. jointly. D., for a valuable consideration moving from B. and C., promised them to pay for the goods. And A., at D.'s request and with his knowledge, cancelled the charges for the price of the goods on his books, which were made in part against B. and C., and in part against C. alone, by transferring them to the account of D. *Held*, that the statute of frauds was no bar to an action by A. against D. for the price of the goods.

CONTRACT for the price of goods sold and delivered. Writ dated December 7, 1868. The items of an account annexed to the third count of the declaration, sixty-seven in number, all bore date between May 30 and October 17, 1867, and were alleged to have been "contracted by Patrick Hughes and John Hughes, Jr., sons of the defendant, who were released therefrom and said account transferred and charged to the defendant at his request by the plaintiff."

At the hearing before an auditor to whom the case was referred, it appeared, upon the production of the plaintiff's books of account, that the first fifty-eight items were charged therein to Patrick Hughes and John Hughes, Jr., the defendant's sons, and the nine other items to John Hughes, Jr., alone; and that the account was charged to the credit, not of Adrian Langdon, the plaintiff, but of "Burton & Langdon." The defendant con-

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tended that the action could not be maintained upon this account ; and the plaintiff, against the defendant's objection, was allowed to prove, in explanation of it, that he and Francis Wilcox were partners in the business ; "that Wilcox, about April 1, 1867, sold his interest in the firm to Sterling Burton, who was to become a partner with the plaintiff in the place of Wilcox ; that Burton was disappointed in his arrangements to procure the necessary capital to pay Wilcox, and at some time near April 1, 1867, arranged, through the plaintiff, with certain persons to give their promissory notes to Wilcox for the amount of the purchase, which they did with the understanding, among all the parties, that if Burton, or some one for him, did not pay the notes in six months, he was to be considered and paid wages as a clerk from said April 1, and have nothing of profit or loss in the business ; that the parties then went on with their business, and opened books, and sold goods, in the name of Burton & Langdon, and matters continued in this state until about February 1, 1868, when Burton, being unable to pay the notes, left the business, being paid as a clerk for his services ; and that Burton never put in any capital."

The auditor found that all the sixty-seven items "accrued in relation to a contract in which Patrick Hughes and John Hughes, Jr., were jointly interested ;" and further found "that in 1867 they had bought a quantity of wood, and were engaged in converting it into charcoal under a contract with the Millicton Iron Works ; that Patrick left at some time during the season, and on October 25, 1867, John, Jr., sold out the contract or job to the defendant, who was to pay the debts, or some part of them, of Patrick and John, Jr. ; and that, some time in the winter following, the defendant went to the plaintiff's shop, and told Burton and the plaintiff that he had bought out his boys in the job, and was to pay their debts, and would pay this debt," referring to the account of sixty-seven items, "and directed it to be transferred to him, and it was so transferred and charged to the defendant." The defendant contended that all this "only proved an agreement which was within the statute of frauds, and not binding on the defendant."



At the trial in the superior court, before *Devens, J.*, the auditor's report was put in evidence, and was not contradicted, "except so much of it as was involved in the following inquiries, which were submitted to the jury upon evidence offered by both parties, and were answered in the affirmative: Did the defendant agree with his sons to pay the debt due from them to the plaintiff? Was the account of the sons transferred to the defendant, with his knowledge and at his request? Was the account of the sons credited on the books of the plaintiff, with the knowledge of the defendant and at his request?"

The case was reported for the determination of this court, under an agreement of the parties that judgment should be entered for the plaintiff for a certain sum, if the court should be of opinion that on the facts reported by the auditor the plaintiff was entitled to recover upon the account annexed to his third count, and otherwise the plaintiff should have judgment for a less sum.

*J. Dewey, Jr.*, for the plaintiff.

*B. Palmer*, for the defendant.

AMES, J. It has often been decided that charges in a book of accounts are not written contracts, but the private memoranda of the party, and as such open to explanation. *James v. Spaulding*, 4 Gray, 451. *Banfield v. Whipple*, 10 Allen, 27. The plaintiff therefore had a right to account for the fact that the books appeared to be kept in the name of himself and another person, by showing that an intended partnership with that person had never gone into effect, and that he was himself the sole owner of the goods charged in the account. Burton had never fulfilled the condition on which he was to become a partner with the plaintiff, and according to the terms of their agreement was merely the plaintiff's clerk. The action is therefore rightly prosecuted in the name of Langdon alone.

The defendant, for a valuable and sufficient consideration, had assumed upon himself, by his contract with his sons, the payment of their debt to the plaintiff. The case finds that the plaintiff with the knowledge and at the request of the defendant, cancelled the charge against them by transferring the entire account to the defendant's account. By substituting himself in their place in

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this manner, the whole became the defendant's own debt, and it is wholly immaterial that a portion of the items were charged originally to one only of his sons. The case therefore comes within the rule laid down in *Alger v. Scoville*, 1 Gray, 391; *Wood v. Corcoran*, 1 Allen, 405; *Walker v. Penniman*, 8 Gray, 233; *Furbish v. Goodnow*, 98 Mass. 296; *Browning v. Stallard*, 5 Taunt. 450.

*Judgment for the larger sum.*

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ROBERT W. ADAM, administrator, *vs.* PHILIP EAMES.

On the trial of an action upon a promissory note, the plaintiff testified to admissions of the defendant in a conversation with him, in proof of the signature; and it appeared that at the end of the conversation there was an understanding between the parties that they should have another interview concerning the note, and that such an interview was had after the action was brought; but the plaintiff did not testify to what occurred at it. *Held*, that it was not competent for the defendant to prove what he said at this interview, either by cross-examination of the plaintiff, or by his own testimony.

CONTRACT on a promissory note purporting to be signed by the defendant, payable to the order of Ethan Janes, the plaintiff's intestate. The defendant denied signing the note. Trial, and verdict for the plaintiff, in the superior court, before *Putnam, J.*, who allowed a bill of exceptions of which the following is the portion relating to this issue :

"The plaintiff was called as a witness, and was asked by his counsel, among other things, if he had ever had an interview with the defendant about the note. He replied that he had two, one before the commencement of the suit, and one after.

"He was then asked to state what the defendant said to him about the note at the first interview; and he answered that he showed the note to the defendant, and the defendant took it, held it some time, looked at it, and said he supposed he had pretty much paid the note, that he had paid Janes money from time to time on Janes's statement that the note was lost or stolen, and had his receipts for it; that the defendant produced two receipts signed by Janes, (of which the witness took copies,) and said he

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would bring in his other receipts and settle up. The plaintiff also testified that he told the defendant that, if he would come to him and present the receipts, it was all he wanted ; and that the defendant did not come to him until after he had been sued, when he met him at the witness's office. The counsel made no inquiry as to the second interview, and the witness said nothing about it.

"On cross-examination, the defendant's counsel asked the witness what the defendant said to him at the second interview he had spoken of, after the suit was brought. This was objected to by the plaintiff's counsel, and excluded by the judge, to which exclusion exception was taken. The same question was put by the defendant's counsel to the defendant, on his own examination, as to what he said at the second interview ; but the judge excluded it, and the defendant excepted."

*T. P. Pingree & J. M. Barker*, for the defendant. When a matter under discussion at an interview between parties is left open, with notice or an understanding that they are to meet again with reference to it, and in pursuance of said notice or understanding they do meet again and discuss the same subject, the two transactions are to be deemed one interview ; and if any act or omission of a party on one of the occasions is relied on as an admission against himself with reference to the subject discussed, he has a right to insist that the declarations on the two occasions shall be taken together. 1 Greenl. Ev. §§ 201, 218. *Randle v. Blackburn*, 5 Taunt. 245. *Thomson v. Austen*, 2 D. & R. 358. *Whitwell v. Wyer*, 11 Mass. 6, 10. *Mattocks v. Lyman*, 18 Verm. 98.

*S. W. Bowerman*, for the plaintiff.

BY THE COURT. The general principle for which the defendant contends, namely, that, when the admission of a party is offered in evidence, he is entitled to have the whole of what he said on the subject, at that interview, stated as a part of the evidence, is correct, and is not denied. But it does not extend to what he said on another and distinct occasion. It would be unreasonable and dangerous to permit him, on another and separate occasion, to make other statements and put them in evidence and none of the authorities cited for the defendant authorize such

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a practice. The evidence excluded related to another conversation at another interview, and was properly excluded.

*Exceptions overruled.*

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AMOS BREWER vs. HOUSATONIC RAILROAD COMPANY.

On the trial of an issue whether goods delivered by the plaintiff to the defendants were accepted by them, they called as a witness their agent, to whom the delivery was made, and asked him whether he ever accepted the goods. The judge excluded the question; but ruled that they might show what was done, or what was not done, by them in reference to the goods. *Held*, that they had no ground of exception.

In an action for the price of goods sold and delivered under a special contract, there was no dispute as to the contract price of the goods stipulated to be delivered, but the defendants contended that those actually delivered were of inferior quality and were not accepted. *Held*, that evidence of what the goods delivered were worth was admissible on this issue.

CONTRACT for the price of 192 cords of wood sold to the defendants, and drawn and delivered to them at their station in Sheffield, under a special contract.

At the trial in the superior court, before *Putnam, J.*, there was no dispute as to the contract price of the wood stipulated to be delivered being five dollars per cord, and that the plaintiff had drawn 192 cords of wood to the station and delivered it there; but the defendants contended that the quality of the wood delivered was inferior to the requirement of the contract. The plaintiff contended that it was of the quality required, or, if not so, that the defendants had nevertheless accepted it.

Upon this issue, the defendants called their superintendent and station-agent as witnesses, and asked them, each, whether he ever accepted the wood that was delivered. The judge excluded this question, on the plaintiff's objection; but at the same time ruled "that the defendants might show what was done, or what was not done, by them, in reference to the wood; and that the jury must find whether the defendants had accepted the wood, under proper instructions from the court."

The defendants also asked the two witnesses "what was the mass of the wood delivered worth;" and stated that they did so

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Brewer v. Houstonian Railroad Company.

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“for the purpose of showing that the wood which was delivered was not what was bargained for.” But the judge excluded the question.

The defendants further offered to show “that they never made purchases of such wood as the plaintiff delivered, and for which he sought to recover, and never used any such wood;” but the testimony was excluded.

The jury returned a verdict for the plaintiff, and the defendants alleged exceptions to these three rulings on the evidence.

*J. Dewey, Jr.*, for the defendants.

*H. C. Joyner*, for the plaintiff.

MORTON, J. Both parties agree that the defendants entered into a contract to buy a certain quantity of wood of the plaintiff at five dollars a cord, and that the plaintiff had drawn this quantity to the defendants' depot. The defendants contended that this wood was not of the same kind or quality as the wood bargained for. The plaintiff, on the other hand, contended that the wood was of the same kind and quality; and he also claimed that, if it was not, yet the defendants had accepted it as delivered under the contract. This was the only controversy between the parties.

Upon the question of acceptance, the defendants asked their superintendent and their agent, each, whether “he ever accepted the wood.” The court excluded the question, but ruled “that the defendants might show what was done, or what was not done, by them, in reference to the wood.” This would include what was said or left unsaid by them to the plaintiff. We are of opinion that the defendants have no ground of complaint. They were allowed to put in all the facts. The question put called for a conclusion or opinion of the witness as to whether what had been done or said, or left undone or unsaid, by the defendants, amounted in law to an acceptance; and was therefore incompetent.

But we are of opinion that the testimony offered, of the value of the wood actually delivered, should have been admitted. The fact that the wood delivered was of much less value than five dollars a cord, if proved, would have some tendency to show that

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it was not of the kind and quality bargained for. The same question arose in *Upton v. Winchester*, 106 Mass. 330, and the evidence was held to be admissible. See also *Bradbury v. Dwight*, 3 Met. 31.

The other exception taken at the trial was not argued, and we consider it waived.

*Exceptions sustained.*

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WESLEY L. SHEPARDSON vs. STEPHEN T. WHIPPLE.

The condition of a mortgage of goods by F. to W. was, that F. should pay a promissory note which he had given in consideration of W.'s promise to pay his debts, and also indemnify W. against liability "on account of his having become surety for F. on a bond given by F. as principal and W. as surety" to dissolve an attachment of the goods. Such a bond never was given; but after taking the mortgage W. receipted for the goods to the officer, sold part of them, and paid F.'s debts out of the proceeds. Held, that the condition of the mortgage was satisfied as to the promissory note, and never applied to W.'s liability on the receipt to the officer.

TORT for the conversion of some household furniture. Writ dated October 11, 1869.

At the trial in the superior court, before *Devens, J.*, the plaintiff claimed title to the furniture under a mortgage thereof, made on August 18, 1868, by Bernard F. Fellows to Ferdinando N. Burdick, and assigned on September 13, 1869, to the plaintiff, as security for a promissory note of Fellows for \$275, payable on demand; and, to prove the conversion, he introduced the testimony of John Crosby, who as the defendant's agent took the furniture from the possession of Fellows on August 19, 1868; and he also proved a demand on the defendant for the furniture, and the defendant's refusal to comply with it.

The defendant, admitting Crosby's agency and his taking of the furniture, and the plaintiff's demand and his own refusal, claimed title to the furniture under a mortgage of it and a stock of groceries to him by Fellows on August 11, 1868, the condition of which was "that if Fellows shall pay to Whipple, or his assigns, the sum of \$1000 as due by his note to Whipple dated

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August 11, 1868, for said sum and interest, and also see Whipple harmless and free from all loss, cost and trouble on account of his having become surety for Fellows upon a bond given by Fellows as principal, and Whipple as surety, to Samuel Halliwell, said bond having been given to dissolve an attachment, as is provided by the 137th chapter of the statutes of this Commonwealth, within one day from the date hereof, then the sale is void, otherwise in full force and effect."

The plaintiff contended that the condition of this mortgage had been performed and satisfied, and on that issue these facts were proved :

No bond to dissolve Halliwell's attachment in his suit against Fellows was ever given, but this defendant, Whipple, on August 11, 1868, subsequently to the execution of the mortgage by Fellows to him, made an arrangement by which he receipted to the officer for the attached property, which comprised a portion of the property included in both mortgages, agreeing safely to keep and redeliver it to the officer or attaching creditor on demand. Halliwell recovered judgment for \$1175.84 in his suit against Fellows, at the same term of the superior court at which the present action was tried.

The consideration of the promissory note of Fellows to this defendant for \$1000 was an agreement of the defendant to pay certain debts owed by Fellows ; and on August 18, 1868, the defendant sold part of the property which he receipted for, not including in the sale any of the property comprised in the plaintiff's mortgage ; and paid those debts, to the amount of \$1083.83, out of the proceeds, which amounted to \$1790. " The note was made for a round sum, sufficient to cover (as it was then supposed) the amount of said debts."

The defendant did not contend that he was entitled to hold the furniture, or any part of it, as receiptor ; and it did not appear that the furniture, or any part of it, was ever in his actual possession until it was taken possession of by Crosby ; but he claimed only under and by virtue of his mortgage, and contended that the facts did not show a satisfaction of the condition of the mortgage deed.

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The plaintiff argued that the facts did show such a satisfaction, and of this opinion was the judge, who directed a verdict for the plaintiff for the value of the furniture, which was assessed at \$250, and reported the case for the revision of this court.

*B. W. Bowerman*, for the defendant.

*T. P. Pingree & J. M. Barker*, for the plaintiff.

CHAPMAN, C. J. The defendant's mortgage was made on two distinct conditions. The first was, to secure the payment of the note of Fellows to the defendant for \$1000. The second was, to save the defendant harmless as surety of Fellows in an alleged bond to Halliwell to dissolve the attachment in the suit of Halliwell against Fellows. The mortgage was dated August 11, 1868. When the note should be paid, and the suretyship released, the defendant could have no further claim to the mortgaged property.

On the 18th of the same month, a part of the mortgaged property, but not including the property in controversy in this action, was taken by Whipple and sold, and he received the proceeds and paid the debts which constituted the consideration of the note. This satisfied that portion of the consideration of the mortgage. The defendant contends that this would not be so unless such was Whipple's intention. But we think such was the legal effect of the payment. Whipple acted as the trustee of Fellows in selling the goods and making the payment, and when the debts were paid, the consideration of the note was thereby extinguished.

The bond to dissolve the attachment was never in fact given. An arrangement was made, by which Whipple gave to the officer a receipt for the goods attached, in the usual form. It included a part of the demanded property. The defendant contends that, the receipt having been given instead of the bond to dissolve the attachment, the condition of the mortgage applies to it and includes it. The plaintiff in that action recovered judgment against Fellows for \$1175.84, and the defendant thereby became liable on his receipt. But he might have retained the property, or have taken a mortgage of it with condition to indemnify him against his liability on the receipt. He neglected to do either; but suffered Fellows to take the attached property without giving him any security for his liability on the receipt. For the terms of the



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mortgage do not apply to the receipt, but merely to the bond, which was not given; and we have no power to enlarge its terms. It is not like a mortgage given to secure the payment of a note which is afterwards paid by giving another note in renewal, as the defendant suggests. In such a case, the mortgage still remains valid, and secures renewal notes. But in this case the bond would be for the dissolution of the attachment, and the receipt is for a different purpose. *Judgment on the verdict*

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#### INHABITANTS OF SHEFFIELD vs. INHABITANTS OF OTIS.

If an action is submitted in the superior court, by agreement of the parties, for the judge to find the facts and report the whole case for this court to decide which party is entitled to judgment, his finding of a material fact upon conflicting evidence is not open to revision, although he reports all the evidence.

The provisions of the Sts. of 1865, c. 230, and 1868, c. 328, § 3, relating to the acquirement by soldiers in the civil war of settlements in cities or towns of which they were inhabitants and as part of whose quotas they were duly enlisted and mustered, apply to drafted men as well as volunteers; and it is immaterial to the question whether a soldier gained a settlement under those provisions, that, after having been in due form enlisted and mustered, and having served one year and more, he was discharged as illegally drafted.

CONTRACT to recover the amount of expenses incurred by the plaintiffs for the support, as a pauper, of Candace, wife of William W. Walley, whom they contended to have gained a settlement with the defendants, under the Sts. of 1865, c. 230 and 1868, c. 328, § 3, by his service as a soldier during the civil war. The case was heard in the superior court without a jury, and reported by *Devens, J.*, under an agreement of the parties "that such facts might be found as were in dispute, and the whole case reported for the decision of" this court "as to whether the plaintiffs are entitled to recover, in which case it is agreed that judgment should be for them for" a specified sum, "or whether the defendants are entitled to judgment." The judge found, among other things, that William W. Walley was an inhabitant of the town of Otis in the year 1863, at the time when he was drafted

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as a soldier ; and set forth in the report all the evidence on which he made this finding. The substance of the report is stated in the opinion.

*J. Dewey, Jr.*, for the plaintiffs.

*M. Wilcox*, for the defendants.

MORTON, J. The plaintiffs are entitled to recover if William W. Walley gained a settlement in the town of Otis under the St. of 1865, c. 230. The first section of this act, as amended by the St. of 1868, c. 328, § 3, provides that any person who shall have been duly enlisted and mustered into the military or naval service of the United States, as a part of the quota of any city or town in this Commonwealth, under any call of the President of the United States, during the recent civil war, and who shall have served not less than one year, and the wife or widow and minor children of such person, shall be deemed thereby to have acquired a settlement in such city or town ; provided such person was, at the time of his enlistment, of the age of twenty-one years and an inhabitant of such city or town.

The question whether Walley was an inhabitant of Otis at the time of his enlistment is a question of fact exclusively within the province of the presiding judge who tried the case, trial by jury having been waived. There was conflicting evidence upon this question, to be weighed by the judge, who only can determine what credit the different witnesses are entitled to. We have no right to revise his finding. The special order of the war department discharging Walley because he was "illegally drafted," if competent upon this issue, is not conclusive. It does not show that the draft was illegal because he was not an inhabitant of Otis. It may have been for other reasons.

The only question, therefore, in the case, is whether Walley was, within the true meaning of the statute, duly enlisted and mustered into the military service of the United States, as a part of the quota of the town of Otis. The facts agreed are, that "Walley was drafted and mustered into the service of the United States, by the military authorities of the United States, from the town of Otis in 1863, and actually served as a part of its quota from July 1863 to March 1865, when he was discharged from

service" by virtue of a special order of the war department, "as a person illegally drafted." It is also agreed that, after he was drafted, he was arrested by a marshal, acting in behalf of the United States, and not of the town of Otis, and mustered into the Fifty-Fourth Massachusetts Regiment.

It seems clear to us that the case is not taken out of the statute by the fact that Walley was drafted, and did not volunteer to enter the service. The words of the statute are, "any person who shall have been duly enlisted," and not any person who shall voluntarily enlist. By the primary meaning of the word, a person is "enlisted" whose name is duly entered upon the military rolls, and it applies to those who are drafted as well as to those who volunteer. Both are enlisted. The word is used in this sense in the articles of war for the government of the armies of the United States. The eleventh article provides that, "after a non-commissioned officer or soldier shall have been duly enlisted and sworn, he shall not be dismissed the service without a discharge in writing." The twentieth article provides that "all officers and soldiers who have received pay, or have been duly enlisted in the service of the United States, and shall be convicted of having deserted the same, shall suffer death or such other punishment as by sentence of court martial shall be inflicted." U. S. St. 1806, c. 20; 2 U. S. Sts. at Large, 361, 362. In both of these articles the term "duly enlisted" necessarily includes soldiers who have been drafted, as well as those who have entered the service as volunteers.

But the defendants further contend that Walley was not "duly enlisted and mustered," within the statute, because he was discharged from the service as a person illegally drafted. We cannot concur in this view. The special order discharging him is conclusive evidence that he was honorably discharged. *Fitchburg v. Lunenburg*, 102 Mass. 358. If it be admitted that it is conclusive evidence of the fact, therein recited, that he was illegally drafted, the consequences claimed by the defendants would not follow. Walley was in due form enlisted and mustered into the service, and discharged his duty as a soldier for nearly two years. He went to make up the quota of Otis, and that town was as

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much benefited by his service as if he had voluntarily enlisted or had been legally drafted. He rendered, in behalf of the town, the services in consideration of which the privileges of a legal settlement therein have been conferred by the statute. We are of opinion that the intention and spirit of the statute embraces every soldier who has in good faith served for the benefit of the town for not less than a year, and who was in due form enlisted and mustered into the service, whether he was by law required to serve or not. *Bridgewater v. Plymouth*, 97 Mass. 382. Upon the facts agreed and proved, there must be

*Judgment for the plaintiffs.*

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HENRY COLT & others, executors, vs. FRANKLIN B. CONE.

The provision of the Gen. Sta. c. 130, § 18, that if any law for the limitation of actions is alleged in defence against a demand in set-off, the limitation shall be applied as if to an action brought thereon at the same time with the plaintiff's action, exempts from the special statute of limitations of actions against executors and administrators (Gen. Sta. c. 97, § 5) a demand in set-off, pleaded more than two years after an executor gave his bond, in an action brought by him before the end of the two years.

In an action by A. on B.'s promissory note, in defence against which B. sets up that he sold stock in the Ohio and Mississippi Railroad Company to A. for a sum to be ascertained and indorsed on the note, parol evidence is not competent to vary a memorandum signed by the parties that "A. takes B.'s Ohio & Miss. stock for \$5100 & odd dollars, to be ind. on B.'s note on date" of the sale; and the construction of the memorandum, as a contract, is for the court and not the jury, if there is no dispute as to the signification of the abbreviations, or the number of dollars more than \$5100 and less than \$5200, or the specific note, referred to therein.

CONTRACT by the executors of the will of William Pollock, on a promissory note of the defendant, dated December 9, 1857, for \$6494.11, payable on demand, to his own order, with interest, by him indorsed in blank, bearing indorsements of the receipt of interest up to April 1, 1862, and also the following indorsement, signed by Pollock: "\$5,133.33. April 23, 1863. Received on the within note, this date, five thousand one hundred thirty-three dollars, thirty-three cents." Writ dated October 7, 1867.

The defendant answered on February 11, 1868, admitting that he was the maker of the note, that Pollock at the time of his

death was the holder of it, and that all the indorsements alleged by the plaintiffs, save the indorsement above quoted as signed by Pollock, were correct; but alleging that this was incorrect, and should have been made for \$6984.35, and that the note was paid in full and the defendant owed the plaintiffs nothing thereon.

The defendant at the same time declared in set-off; and on November 12, 1869, he filed, by leave of court, an amended declaration in set-off, in which he alleged that on April 23, 1863, the defendant owned, and Pollock had in his possession, certain securities called Trustees' Certificates of the Ohio & Mississippi Railroad, which the defendant agreed to sell to Pollock, and Pollock agreed to buy, for fifty per cent. of what they had cost the defendant, including interest; that Pollock at the same time agreed to indorse upon the defendant's note, which he was holding, the amount which he was to pay for the securities; but that Pollock never did so, and his executors refused to do so; and that upon the said securities, retained in his or their possession, Pollock or his executors collected large sums of money, to wit, \$20,000, to which the defendant was entitled. Another count of the declaration in set-off was upon an account annexed, for poultry and country produce of various kinds sold by the defendant to Pollock, the items of the account running from June 1863 to May 1865.

The plaintiffs, in answer to the amended declaration in set-off, admitted that Pollock in his lifetime bought the defendant's interest in the Ohio & Mississippi Railroad, and that the amount he was to pay for it was to be applied on the defendant's note and they alleged that it was indorsed and applied upon the note, and that if Pollock or his executors ever afterwards received proceeds from the interest in the railroad which the defendant sold, they received the same as of their own right, and were not liable therefor to the defendant. They also denied all the items of the defendant's account against Pollock for poultry and country produce. And for further answer, they set up the special statute of limitations of actions against executors and administrators, Gen. Sts. c. 97, § 5, and alleged that the amended declaration in set-off was not filed within two years after they gave their bond

At the trial in the superior court, before *Putnam, J.*, it appeared that Pollock died December 9, 1866; that his will was duly proved and allowed February 5, 1867; and that the plaintiffs gave bond as his executors February 23, 1867. The plaintiffs requested the judge to rule that certain items of the account annexed to the amended declaration in set-off, which were not included in the declaration in set-off first filed, were barred by the special statute of limitations; but he ruled otherwise.

The plaintiffs also requested, and the judge refused, a ruling that the defendant could avail himself of a set-off "only to the extent of reducing the amount due on the note in suit, so as to prevent a judgment in favor of the plaintiffs on the note, and was not entitled to a judgment against the plaintiffs for any balance thereof beyond the note."

The defendant contended that on or about April 23, 1863, he and Pollock, in New York, made an oral contract for the sale by him and purchase by Pollock of "a one sixth interest in a share in a contract to construct the Ohio & Mississippi Railroad, for one half of what it had cost him, including interest on the sums paid out for and on account of said stock as a part of the cost;" the plaintiffs contended that such interest was not to be included in the computation; and whether or not it was to be included was "the only question in dispute between the parties, so far as the contract was concerned."

It appeared that it was agreed in New York that the half of what the stock had cost the defendant should be ascertained at the Pittsfield Bank in Massachusetts on a subsequent day, and be indorsed on the defendant's note, "in part payment;" and that the parties twice afterwards met at the bank and had conversation concerning the subject; and the defendant testified "that at one of these interviews there was a memorandum in writing signed by him and Pollock respecting the amount to be indorsed on the note, which memorandum was given to one Adams, the cashier of the bank, to aid him in making a calculation of the amount, and that Pollock said at the time, after it was made, that if there was anything about it which was not right it should be made right."

The plaintiffs then put the memorandum in evidence. It bore date of May 16, 1863, and was signed by Pollock and the defendant; and the body of it, which was in the handwriting of Adams, was as follows: "Pollock takes F. B. Cone's Ohio & Miss. for \$5100 & odd dollars, to be ind. on F. B. Cone's note on date they were in N. Y., say about 15th April." It also appeared that the body of the indorsement of the receipt of \$5133.33, upon the note, was in Adams's handwriting. The plaintiff Colt testified that, after Pollock's death, this memorandum of May 16, 1863, was found, pinned to the note, among his effects.

The plaintiffs contended "that this written paper limited the amount to be indorsed on the note in payment of the stock, and that the sum so limited could not exceed \$5200." But the judge ruled "that, while the paper was evidence tending to show that the plaintiffs' claim as to what was the contract was correct, yet that it was not conclusive, and that the jury were to say whether the parties intended by it to limit the amount to be indorsed on the note to the sum named; that if they found that the parties intended this as a reduction to writing of their contract, or a final agreement between them as to the amount to be indorsed on the note, it was conclusive, and could not be controlled, and that by it the sum to be indorsed was to be a sum not exceeding \$5200; but that, in determining this, they were to consider the evidence of the defendant as to the purpose for which the paper was made, and that Pollock agreed that if there was anything about it not right it should be made right." The jury returned a verdict for the defendant for \$1502.42; and the plaintiffs alleged exceptions.

*M. Wilcox*, for the plaintiffs.

*T. P. Pingree & J. M. Barker*, for the defendant.

GRAY, J. The rulings upon the defendant's right to recover under his declaration in set-off were correct. The statute of set-off declares that "if any law for the limitation of actions" (thus clearly including the special statute of limitation of actions against executors and administrators, as well as the general statute of limitations) "is alleged by way of defence to the defendant's demand, the limitation shall be applied in the same manner as it would have been to an action brought on the same

demand if it had been commenced at the time when the plaintiffs' action was commenced." Gen. Sts. c. 130, § 18.

The point, that the defendant could avail himself of so much only of his set-off as was equal in amount to the plaintiffs' demand, was wisely abandoned at the argument; for it is expressly provided that, "if it appears that there is a balance due from the plaintiff to the defendant, judgment shall be rendered for the defendant for the amount thereof." Gen. Sts. c. 130, § 20.

But the effect of the writing dated May 16, 1863, was wrongly submitted to the jury. That writing was not a mere informal receipt or bill of parcels. It was a complete, though brief, agreement, signed by both parties, describing the property to be taken by the plaintiffs' intestate and limiting the price which he was to pay therefor, and fixing the date as of which that price should be indorsed on the defendant's note. If there had been any controversy as to the meaning of the words "Ohio & Miss.," or more than one note had been given by the defendant, parol evidence would doubtless have been admissible to identify the subjects of the contract. But there was no dispute upon either of these questions; for it was admitted that the property transferred by the defendant to the plaintiffs' intestate was stock in the Ohio & Mississippi Railroad Company, and that the note in suit was the only one to which the agreement could relate. These facts being ascertained, there was no doubt or ambiguity in the agreement, and the question of the intent of the parties to it must be determined by the court from the writing itself.

*Exceptions sustained.*



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 STOCKBRIDGE IRON COMPANY *vs.* HUDSON IRON COMPANY.  
 HUDSON IRON COMPANY *vs.* STOCKBRIDGE IRON COMPANY.

To a bill in equity filed by the grantor to enforce a reservation in a deed, the grantee answered that the terms of the reservation were inserted by a mutual mistake of the parties and defeated their intention; and filed a cross bill to reform the deed upon a like allegation. *Held*, on the trial of issues for a jury upon the cross bill, that the grantee had no ground of exception to instructions to the jury that the intention and mistake must be proved beyond a reasonable doubt, and that, in such a case, this meant a degree of proof which they would act upon in the most important affairs of life, and which would satisfy their judgments and consciences of the fact to be proved.

To a bill in equity filed by the grantor of land containing an ore-bed, to enforce a reservation in the deed, of a right to mine a certain quantity of the ore, the grantee answered that the parties intended to insert in the deed a limitation of the right to the supply of certain furnaces and omitted to do so by mutual mistake; and filed a cross bill to reform the deed upon a like allegation. Upon the cross bill, the court framed an issue for the jury, Did the parties intend to insert in the deed, and omit to do so by mistake, a clause by which the right was limited to the supply of the furnaces? And at the trial, upon motion of the grantee, and against the objection of the grantor, a second issue was ordered, Was it the understanding, intent and agreement of the parties, that by the contract of purchase and sale of the land the right was limited to the supply of the furnaces, and was the deed delivered and accepted in the belief and with the understanding that it gave legal effect to such understanding, intent and agreement? At the close of the evidence, the grantor contended that it showed that the parties agreed to deliver and accept the deed in its present form after a discussion of the question whether its terms did limit the right to the furnaces; whereupon the judge ordered a third issue, Was the deed delivered and accepted with the mutual intention and understanding that it should be and was in its present form, after the question whether its terms so limited the right had been raised and discussed between the parties? The grantee objected to the submission of this issue; but did not offer, or ask time, to introduce further evidence. The jury answered the first issue in the negative, and the third in the affirmative, and failed to agree upon the second. *Held*, (1) that the submission of the third issue to the jury was a proper exercise of the discretion of the judge; (2) that the second issue was single in law, though depending on two propositions of fact; (3) that the cross bill should be allowed to be amended by adding the allegations of an agreement of the parties antecedent to and independent of the deed, necessary to constitute one of the propositions, the suit having so far proceeded with no objection on the part of the grantor that the cross bill was defective in that particular; and (4) that the second issue was not rendered immaterial by the verdicts upon the first and third issues, but its determination under the amended cross bill was essential to the decision of the suit.

■ a deed poll of land containing an ore-bed, a clause "reserving to" the grantor "the right of mining on the granted premises" a certain quantity of ore annually, at a certain duty per ton, licenses him to enter and mine, but saves to him no title in the land, or in the ore before it is mined and separated from the land; does not restrict the grantee from mining at the same time, even to exhaustion of the ore; and may be reformed in equity for variance through mutual mistake from the previous oral contract of the parties, as a reservation, and not an exception from the grant, and therefore not within the statute of frauds.

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In a deed by a corporation of land containing a bed of iron ore, a right reserved to the grantor "of mining on the granted premises, for the use of said company," a certain quantity of ore, is assignable, and is not subject to limitation or suspension by extrinsic evidence that the corporation was chartered to manufacture iron only in certain furnaces and work mines only for its own use, and that at the time of the deed it expected and intended to discontinue business.

If one of the parties to a deed which was intended and understood by both of them to conform to a previous contract, but fails to do so, delays, in an honest and reasonable reliance upon their original construction of the deed, to bring a suit in equity to reform it, for several years after he has notice that the other party denies that construction, the delay is not imputable to him as laches, in defence against the suit.

THE FIRST SUIT was a bill in equity filed December 5, 1868, by the Stockbridge Iron Company, a corporation chartered by this Commonwealth, alleging that on July 20, 1849, said company was seised and possessed of a tract of land containing beds of iron ore, in West Stockbridge, and on that day conveyed it to the Hudson Iron Company, a corporation established under the laws of New York, its successors and assigns, by a deed containing the following clause: "And further reserving to the Stockbridge Iron Company the right of mining on the above granted premises, for the use of said company, an amount of ore not exceeding seven thousand five hundred tons annually at a duty of thirty-seven and a half cents per ton, including all the facilities needful for doing the same;" that under this clause the Stockbridge Iron Company, its successors and assigns, has a perpetual right to mine and carry away ore from the land, to the extent and upon the terms so provided, and the Hudson Iron Company is bound to refrain from mining and carrying away ore from the land to any extent or in any manner which shall interfere with the said perpetual right; but that the Hudson Iron Company now denies the said right, and refuses to permit the Stockbridge Iron Company, or its assigns, to exercise it, and is mining and carrying away ore to an extent and in a manner calculated to defeat it; wherefore the bill prayed for a declaration by the court of the respective rights of the parties under the deed, and for protection of the right of the Stockbridge Iron Company by injunction and otherwise.

By a copy of the deed, which was annexed to the bill, it appeared that, immediately following the granting clauses and pre-

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ceding the clause in question, was the following clause : "Excepting, however, from this conveyance, and reserving, one piece of land, two rods square, for a family burial ground, in the southwest corner of the garden on the premises, with a right to pass and repass, on all proper occasions, from the road to said burial ground, that same reservation being made in the prior deeds by which this property has been conveyed."

The answer admitted seisin and possession of the land by the Stockbridge Iron Company on July 20, 1849, and its execution of the deed with the clauses above quoted ; and further alleged as follows :

"At the time of the conveyance to the Hudson Iron Company by the Stockbridge Iron Company, the latter company was taking ore from the premises and manufacturing the same in its furnaces in Stockbridge, under the provisions of its charter, granted by this Commonwealth by the St. of 1841, c. 19.\* Pending the negotiations for the purchase of the premises by the Hudson Iron Company, it was proposed by the Stockbridge Iron Company to reserve to itself the right to mine and take sufficient ore for the use of its furnaces at Stockbridge. This proposition was strongly objected to by the Hudson Iron Company ; but, it being represented to the Hudson Iron Company by the Stockbridge Iron Company, that, on account of the cost of procuring charcoal, or of bringing anthracite coal to its furnaces, iron could not be profitably made at Stockbridge, and therefore the Stockbridge Iron Company would use the ore under the reserved right for but a few years at most, the Hudson Iron Company finally gave its assent to receive the deed reserving the ore for the use of the Stockbridge Iron Company in its furnaces at Stockbridge. All parties, the Stockbridge Iron Company and the Hudson Iron Company, and the directors and trustees of each, alike understood and intended that the right reserved was to be a right to mine

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\* By the St. of 1841, c. 19, the Stockbridge Iron Company was incorporated "for the purpose of manufacturing pig, cast and bar iron in the town of Stockbridge," and authorized to hold, "for the purposes aforesaid, real estate to the amount of seventy-five thousand dollars, and the whole capital stock of said company shall not exceed one hundred and fifty thousand dollars."

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and take so much ore as should be required for the actual use and supply of the furnaces of the Stockbridge Iron Company at Stockbridge, and that only; and that such use was to be in accordance with represented wants by said company. The deed to the Hudson Iron Company, and the reservation therein, were supposed, and were designed, to carry out this understanding and intention of all parties. The annual production of the Stockbridge Iron Company's furnaces, when in blast, being about three thousand tons of pig iron, and the usual estimate being two tons and a half of ore to one ton of pig iron, the mining right reserved was limited to seventy-five hundred tons annually, at a royalty of thirty-seven and a half cents per ton, the actual value of the ore at the time. The deed was drawn by a director of the Stockbridge Iron Company. When first handed to the agent of the Hudson Iron Company, he objected that it should be made more explicit, and should be prepared by a lawyer; but he finally received it, the parties representing the Stockbridge Iron Company stating that there was but one Stockbridge Iron Company, and they could not use the ore in any way but in their own furnaces. The deed was not actually executed and delivered till August 28, 1849."

"Immediately after receiving the deed, the Hudson Iron Company took possession of the premises, and began to prosecute, and has ever since prosecuted, thorough, extensive and scientific mining operations there."

"The Stockbridge Iron Company, on the other hand, after its deed to the Hudson Iron Company, did not until very recently, and until it procured an amendment of its charter by the St. of 1864, c. 291,\* (of the passage of which act the Hudson Iron Company had no notice,) mine or attempt to mine on the premises,

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\* By the St. of 1864, c. 291, the Stockbridge Iron Company was "authorized to mine ore, for manufacture or sale, on any land owned by said corporation or on which it has or may acquire an interest;" "to dispose of such lands or any mining rights of said corporation therein, by sale, lease or otherwise;" and "to establish works for the manufacture of iron or steel at any such places, in the county of Berkshire, or on the banks of the Hudson River as the stockholders may elect and determine."

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and until such recent period supposed, as is believed, that in accordance with the original intent of the parties, and their true, legal and equitable rights, it had long since ceased to have any claim to take ore under and by force of the reservation in said deed."

"Late in the year 1855, or early in the year 1856, the Stockbridge Iron Company ceased to manufacture iron altogether, and in 1860 sold its furnaces. From the time the Stockbridge Iron Company ceased to make iron, no claim to take ore was made under the reservation in the deed, till 1864. Such claim was then asserted in a letter of the treasurer of said company to the Hudson Iron Company, but was at once and positively denied by the latter company. In 1865 the Stockbridge Iron Company took from the premises a trifling quantity of ore. But none of any consequence was taken, and there was no attempt to practically avail itself of the pretended right asserted in the above mentioned letter of its treasurer, of 1864, prior to 1867."

The answer finally alleged, "upon the said deed and reservation, and upon the facts hereinbefore set forth,"

"1. That under the said reservation there was reserved to the Stockbridge Iron Company for the sole use of said company in its furnaces at Stockbridge, and for no other use or purpose whatever, the right to mine and take so much ore on and from the premises as should be actually required for and used in said furnaces, not exceeding seventy-five hundred tons annually; and that, when the Stockbridge Iron Company stopped business and sold out its furnaces, all rights under said reservation ceased and were extinguished.

"2. That, the clear intent and purpose of all parties to said deed and reservation being to reserve a right to take ore for the exclusive use of the Stockbridge Iron Company in its own furnaces at Stockbridge and not otherwise, a court of equity will not lend its aid to defeat such intent and purpose, but will leave the plaintiffs to their remedy at law.

"3. That, the Stockbridge Iron Company having for a period of more than fifteen years neither practically exercised nor claimed any rights under said reservation, and having during that period

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always recognized the rights of the parties under said reservation to be the same as they were originally intended to be, are now estopped to deny that these rights are different or otherwise, have been guilty of gross laches, and have lost all claim to equitable relief by virtue of their pretended claim, if any they ever had.

“4. That, upon any construction of said reservation, the right of the Hudson Iron Company in the premises and to the ore therein is paramount, and any right of the Stockbridge Iron Company, or any party claiming through or under it, must be exercised in subordination thereto; that the said reservation imposes no limit or restriction upon the extent of the mining operations of the Hudson Iron Company, nor upon the quantity of ore it may mine; that it confers no right of interfering with, or in any way embarrassing the mining operations of the Hudson Iron Company, and no right to use its mining facilities; and that, on the contrary, any mining operations of the Stockbridge Iron Company, or of any party claiming under it, must be so conducted as to in no way impede or disturb the existing works and operations of the Hudson Iron Company, and without its consent cannot be carried on by means of the mining facilities prepared for the sole use of the Hudson Iron Company, and at its sole expense.”

The Stockbridge Iron Company filed a general replication on April 5, 1869.

THE SECOND SUIT was a cross bill filed by the Hudson Iron Company March 1, 1869, in which, after making the same allegations of fact as were contained in the answer to the original bill and are above quoted, it was further alleged that, by the terms of the deed and the reservation therein, the Stockbridge Iron Company was entitled to mine or take ore from the premises to be used only in its own furnaces at Stockbridge; and that, if by said terms it was legally entitled to transfer to purchasers or assigns any right to mine and take ore, or was legally entitled to mine or take ore for sale or to be used in any other manner than in its own furnaces at Stockbridge, “the language of said reservation was inserted in said deed by the mutual mistake of all par-

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ties thereto, and defeats the intention of all said parties." The prayer was, for a decree dismissing the original bill filed by the Stockbridge Iron Company; for an injunction; for a reformation of the deed so as to conform to the true intent of the parties; and for general relief.

The Stockbridge Iron Company, in its answer, among other things denied that pending the negotiations it proposed to reserve to itself only the right to mine and take sufficient ore for the use of its said furnaces; or that it represented or in any manner suggested to the Hudson Iron Company that for the reasons stated in the cross bill, or for any other reason, iron could not profitably be made at Stockbridge, or that the Stockbridge Iron Company would use the ore under its reserved right but for a few years at most; or that the Hudson Iron Company received the deed with the understanding that the ore reserved therein was to be used by the Stockbridge Iron Company only in its furnaces at Stockbridge; or that the Stockbridge Iron Company, or its directors, or the Hudson Iron Company, or its trustees, ever understood or intended that the right to mine, reserved in the deed, was restricted to the supply of the furnaces of the Stockbridge Iron Company, as in said bill alleged; or that the deed to the Hudson Iron Company and the reservation therein were supposed or designed by any of the parties to effect such a restriction; and alleged that on the contrary "it was the design and intent of these defendants and of the plaintiffs, that the right in said deed reserved should be of a vendible, alienable, transmissible right, to be exercised and enjoyed at all places and under all circumstances which the interests of these defendants or their grantees or assigns might make desirable." It also denied that the extent of the right to mine, reserved in the deed, was in any manner graduated or fixed by or in reference to the quantity of ore then being used by the Stockbridge Iron Company at its furnaces; alleged that without inspection of the deed the defendants could not state by whom it was drawn, but denied the allegations of the bill as to any objections to the deed made by the agent of the Hudson Iron Company, or that it was finally received by him by reason of the alleged representations of the parties representing the

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Stockbridge Iron Company, or that any such representations were made; admitted that the deed was delivered on or about August 28, 1849, but alleged that it was executed and placed in the hands of the Hudson Iron Company for examination, about ten days before it was delivered; and further denied "that the language of the reservation in said deed contained was inserted in said deed by the mutual mistake of all or any of the parties thereto, or that the same defeats the intention of the parties to said deed or any of them, or that the Hudson Iron Company is entitled to have said deed in any manner reformed, or that any facts exist which will in any manner, in law or equity, warrant or authorize any reformation thereof." Afterwards, by leave of court, the answer was amended by setting up the statute of frauds; and on March 25, 1871, subject to the objection of the Hudson Iron Company and the revision of the full court, by alleging such laches on the part of the Hudson Iron Company as to debar it from any reformation of the deed.

The Hudson Iron Company filed a general replication on June 29, 1869.

In January 1870, after the decision reported in 102 Mass. 45, the following issue for a jury was framed by the court in the second suit:

*First Issue.* "Did both parties intend to insert in the deed, which was delivered by the Stockbridge Iron Company to the Hudson Iron Company on the twenty-eighth day of August in the year eighteen hundred and forty-nine, a clause by which the right therein reserved to the Stockbridge Iron Company to mine and take ore from the premises should be limited and restricted to the use and supply of its furnaces in Stockbridge, and was in no event to exceed seven thousand five hundred tons annually, and was such clause omitted by the mistake of both the parties?"

At the hearing at which this issue was framed, the Hudson Iron Company moved to include in the order the following additional issue; and the question whether the motion should be allowed was postponed for the determination of the judge at the jury trial.



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*Second Issue.* "Was it the understanding, intent and agreement of both the Stockbridge Iron Company and the Hudson Iron Company, that, by the contract of purchase and sale between the parties of the lands and ore-bed, the reservation to the Stockbridge Iron Company of the right to take seven thousand five hundred tons of ore annually at thirty-seven and a half cents per ton was limited and restricted to the use and supply of the Stockbridge Iron Company's furnaces at Stockbridge; and was the deed delivered by the Stockbridge Iron Company and accepted by the Hudson Iron Company in the belief and with the understanding that the deed gave legal effect to such understanding, intent and agreement?"

The trial was had at May term 1871, before *Gray, J.*, who made a report thereof, of which the following are the material parts:

"It was ruled by the presiding judge that the right reserved to the Stockbridge Iron Company in the deed was not limited to ore to be used in its own furnaces, and might be assigned by it to any other party. This ruling was excepted to by the Hudson Iron Company, and the question of its correctness is reported for the determination of the full court.

"The Stockbridge Iron Company objected to the submission of the second issue to the jury; and contended that a finding of this issue in the affirmative, if the first issue should be answered in the negative, would not warrant a reforming of the deed. But both issues were submitted to the jury, reserving the question of the effect of any finding thereon for the determination of the full court."

The report then set forth the evidence introduced by both parties; and continued as follows:

"At the close of the whole evidence, the Stockbridge Iron Company contended that it appeared thereby that the parties had agreed to deliver and accept the deed in its present form, after it had been a subject of discussion between them which of the constructions thereof, now contended for by the parties respectively, was the true one; and that therefore a finding in favor of the Hudson Iron Company upon the second issue would not warrant

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a decree in its favor, and there was nothing to be submitted to the jury upon that issue. But the judge refused so to rule as a matter of law; and before the beginning of the closing argument for either party, he informed the counsel that he should submit to the jury the following

“*Third Issue.* ‘Was the deed of the land and ore-bed delivered by the Stockbridge Iron Company and accepted by the Hudson Iron Company with the mutual intention and understanding that it should be and was in its present form, after the question had been raised and discussed between the parties whether the reservation to the Stockbridge Iron Company was limited, by the terms in which it was expressed in the deed, to ore to be used at its own furnaces?’

“The Hudson Iron Company objected and excepted to the submission of the third issue to the jury, but did not offer, or ask time to procure, any further evidence.

“The Hudson Iron Company contended that the burden of proof upon the issues framed on its motion was the same as in civil actions. But the jury were instructed that the ordinary rule of evidence in civil actions, that a fact must be proved by a preponderance of evidence, did not apply to such a case as this; that the proof that both parties intended to have the precise agreement between them inserted in the deed, and omitted to do so by mistake, must be made beyond a reasonable doubt, and so as to overcome the strong presumption arising from their signatures and seals that the contrary was the fact; and that in this case proof beyond a reasonable doubt was such a degree of proof as the jury would act upon in the most important affairs of life, and as would satisfy their judgments and consciences of the fact to be proved.

“The judge then proceeded to give instructions to the jury upon the law applicable to the first, second and third issues successively, to which no exception was taken. In these instructions the jury were told that, in order to find for the Hudson Iron Company on the first issue, they must be satisfied that a clause had been omitted which was intended to be inserted; but that the second issue was broader, and covered a misunderstanding of the legal effect of the words used in the deed.

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"No specific instruction was given or asked for as to the burden of proof on the third issue; nor was the judge's attention called, nor any exception alleged, to the omission so to do; and it was therefore not deemed by him to be open to exception, and he refused to allow such an exception first alleged after verdict.

"The jury answered the first issue in the negative, and the third in the affirmative, and failed to agree upon the second.

"The Hudson Iron Company, after the return and affirmance of the verdict, moved for a new trial, because of the rulings upon the construction of the reservation in the deed in its present form, upon the burden of proof, and the submission of the third issue to the jury at all, and because the finding of the jury upon this issue was against evidence and the weight of evidence; but did not offer any new evidence upon this motion. The motion was overruled, and the questions of law presented by this report are reserved for the determination of the full court, who will make such order or decree in the cause as justice and equity may require. The question of laches in applying for a reforming of the deed has not been heard or tried either by a single justice or by a jury."

In vacation after September term 1871, a master was appointed to find and report the facts as to any laches of the Hudson Iron Company in bringing the cross bill, and also as to any defence thereto by reason of any acts, conduct or claims of the Stockbridge Iron Company.

On December 26, 1871, the original suit of the Stockbridge Iron Company against the Hudson Iron Company was referred to the same master "to report any evidence either party may desire to submit as to the issues made by the bill and answer, and as to the understanding and agreement under which the deed and reservation in said bill set forth were made and accepted, and especially any evidence of the practical construction put by the parties upon said deed and reservation." At the time of this reference, the Hudson Iron Company moved that the second issue, submitted to and not decided by the jury upon the cross bill, should be submitted to a jury upon the original bill, and that, until a finding thereon, the original bill should not be heard by the court or

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referred to a master ; but *Gray, J.*, overruled the motion, reserving his ruling thereon, by request of the Hudson Iron Company, for the revision of the full court.

Upon the coming in of the two reports of the master, both cases were heard by *Gray, J.*, and together with the facts and rulings theretofore made and reported upon the cross bill, were reserved for the decision of the full court. The Hudson Iron Company objected to the reservation, upon the same ground (of the want of a finding upon the second issue) on which it had objected to the reference of the original suit to the master. Upon this reservation, the cases were argued together at Boston in January 1872, before all the judges but *Colt, J.*

*S. Bartlett*, for the Stockbridge Iron Company. I. *As to the original bill.* The right and estate of the Stockbridge Iron Company is not derived from or under a license from the Hudson Iron Company, but is a clear exception out of the estate granted. The language of the clause is, "reserving;" but, by referring to prior language, relating to another exception, it is clear that the terms "reservation" and "exception" were used indiscriminately. If the intent is clear, either word will receive the same construction. Co. Lit. 143 a. As to what is a reservation as distinguished from an exception, see Bainbridge on Mines (1st Am. ed.) 84, 78.

The rules of construction applicable are stated with great clearness, in the case of a will, in *Scarborough v. Doe*, 3 Ad. & El. 897, 962, and as applied to a deed would stand as follows: Whilst the intention of the parties ought to be our only guide to the interpretation of their deed, it must be their intention to be collected from the words of the instrument, sealed and delivered by them. No surmise or conjecture of any object which any of the parties may be supposed to have had in view can be allowed to have any weight in the construction of a deed, unless such object can be collected from the plain language of the deed itself.

The thing excepted from the grant is "the right of mining for the use of the company." The grantee seeks to found upon these words a construction, that not merely was the right, so to

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speaking, personal to the grantor corporation, but further, that the court must infer from them that this personal use was limited to a fixed locality, and that, when it should become (by fire, removal or sale) incapable of being enjoyed there, it was the purpose of the deed that the right should terminate. But such a construction of the simple words "for the use of the company" is unwarranted by any rule of law. The mode of enjoyment is nowhere referred to; nor the limitation of that enjoyment, which is to be commensurate with the existence of the corporation. The words "heirs and assigns" are not necessary to a grant of fee to a corporation. Nor do the words, as applied to a corporation, import a personal use, even if they would do so when applied to an individual. A thing granted for the use of a trading or manufacturing corporation is applied to such use, when by its sale or conversion into money it advances or produces the end or purpose of the creation of the corporation.

The Hudson Iron Company further asserts that, if the construction of the deed is adverse to its theory, then there was a mutual mistake as to the terms and effect of the exception or reservation contained in the deed; and that, upon the proofs which it offered to show such mistake, it has a defence to the original bill, although it may fail to maintain the cross bill to correct the mistake. This view proceeds on the ground that it requires less distinct and cogent proof to resist a bill founded on an executed deed, than it does to maintain a bill to correct the alleged mistake in such a deed.

If the original bill were for the specific performance of a contract, the view would be a sound one; since the doctrine in such a case is, that a mistake, even of one party only, will lead the court, not to declare that the plaintiff has no legal rights, but to refuse him equitable aid and leave him to his legal remedies. Fry Spec. Perf. §§ 474, 478. But this doctrine has no application to a bill founded on an executed deed or conveyance. *Vigers v. Pike*, 8 Cl. & Fin. 562, 645. It therefore remains to find if the Stockbridge Iron Company is seeking to enforce specific execution of an executory contract; and it is clear that the original bill proceeds upon the ground of title, not derived from the Hud-

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son Iron Company, but held long before the purchase by that company of part of that title, and excepted out of the purchase. It does not seek to enforce any duty resting on the Hudson Iron Company by reason of any contract on its part; for it made none.

There is a further answer to this attempted defence to the original bill. The Hudson Iron Company has filed a cross bill, which also sets it up; and has had issues framed and tried with a view to support it. Those issues, as framed, settle either that the defence is valid or invalid. If valid, then the defence to the original bill is effectual. If invalid, then the Hudson Iron Company cannot try the matter over again, under the guise that the suits are separate suits. The doctrine is clear that the bill and cross bill constitute one suit. Story Eq. Pl. § 399, and note. 2 Dan. Ch. Pract. (3d Am. ed.) 1647 *§ seq.* *Slason v. Wright*, 14 Verm. 208.

As to the proposition at the close of the answer of the Hudson Iron Company to the original bill, that the facts therein alleged show that for more than fifteen years the Stockbridge Iron Company neither claimed nor exercised any rights under the reservation contained in its deed, and always recognized the rights of the parties to be "as they were originally intended to be;" even assuming that these allegations of fact are sustained by the proofs, yet they are inadmissible to give construction to a deed, the terms of which are so unambiguous, and much less to engraft on it a clause enlarging by parol the estate conveyed, in the manner in which the Hudson Iron Company seeks to enlarge it. The same proposition adds, that by reason of these alleged facts the Stockbridge Iron Company is estopped to deny that the rights of the Hudson Iron Company are as claimed, and has been guilty of fatal laches. But if the facts as proved do not warrant the court in changing the construction of the deed from its plain import, they cannot work an estoppel *in pais*, unless by reason that the Hudson Iron Company has changed its condition; and it is still more difficult to perceive how an estate which one corporation reserved and excepted by deed can be lost to it and conveyed to the other by laches.

II. *As to the cross bill.* It is, in the first place, anomalous in structure. It avers that, by the true construction of the deed, the rights claimed under the reservation were limited to the use of the Stockbridge Iron Company in its furnaces in Stockbridge, and were terminated by the sale of those furnaces; and it then proceeds to allege that if the legal rights of the Stockbridge Iron Company under said reservation are as set forth in its bill, and if it, or any party claiming under it, is legally entitled to mine or to take ore, &c., "the language of said reservation was inserted in said deed by mutual mistake," and prays that the deed may be reformed. But if the legal construction of the reservation be as averred, the defence to any action founded on the deed at law or in equity is perfect; and the Hudson Iron Company cannot invoke the court to reform a deed upon a contingency which has not happened, and which upon its own averment of its legal construction never will happen. *Edwards v. Edwards*, Jacob, 385. It is to be observed that this is not what is known as a bill with a double aspect. Such a bill may be maintained when the title to relief upon either of the propositions on which it is framed will be precisely the same. Here the relief sought is, that the original bill may be dismissed, and also that the deed may be reformed. Story Eq. Pl. § 254.

The cross bill was also brought after such a lapse of time, and under such circumstances of acquiescence, as to preclude the Hudson Iron Company from a right to ask the intervention of the court, by reason of its laches. The court "will not give relief unless in cases where the party seeking it comes as promptly as the nature of the case will permit." *Eads v. Williams*, 4 De Gex, Macn. & Gord. 674, 691. See also *Heaply v. Hill*, 2 Sim. & Stu. 29; *Watson v. Reid*, 1 Russ. & Myl. 236; *Parkin v. Thorold*, 16 Beav. 59, 73; *Clegg v. Edmondson*, 8 De Gex, Macn. & Gord. 787, 810; *Lehmann v. McArthur*, Law Rep. 3 Ch. 496, 504; *Tash v. Adams*, 10 Cush. 252; *Fuller v. Melrose*, 1 Allen, 166; *Fuller v. Hovey*, 2 Allen, 324; *Peabody v. Flint*, 6 Allen 52; *Plymouth v. Russell Mills*, 7 Allen, 438; *Merchants' Bank v. Stevenson*, Ib. 489; *Evans v. Bacon*, 99 Mass. 213.

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The statute of frauds furnishes a further defence to the cross bill; which seeks, by oral evidence, to add to the deed terms "which would so modify the instrument as to make it operate to convey an interest or secure a right which can only be conveyed or secured by an instrument in writing, and for which no writing has ever existed." *Glass v. Hulbert*, 102 Mass. 24, 31. Even if the right in question had been, instead of a reservation by the Stockbridge Iron Company, the subject of a grant by the Hudson Iron Company as owner of the land, to the Stockbridge Iron Company, as a mining privilege or license to work mines, it must, to be valid, have been by deed, such beneficial privilege in land being within the statute of frauds. *Bainbridge on Mines* (1st Am. ed.) 112, 118. *Huff v. McCauley*, 53 Penn. State, 206.

There also remains the question whether the findings upon the issues submitted to the jury dispose of the cross bill.

The first issue is confined to the intent of the parties at the time the deed was delivered, irrespective of their previous intent when the oral contract which resulted in the deed was made. The case finds that the draft or deed was made and dated July 20, but not delivered until August 28, 1849, and the jury have found that at the time of the delivery it was not the intent of the parties that the clause should be inserted which the cross bill now seeks to have inserted by a decree of court.

The second issue couples two distinct questions: first, whether the intent of the parties, at the time "of the contract of purchase and sale between the parties of the lands and ore-beds," was as stated; and second, whether at the time of the delivery of the deed, more than a month afterwards, it was their understanding and belief that it "gave legal effect to the understanding, intent and agreement" as it existed at the time of the contract of purchase and sale. The jury might well have doubted whether there was, at the time "of the contract of purchase and sale," any such intent as is set out in the first proposition, and yet have had no doubt that the parties did not, when the deed came to be delivered, understand or intend that it should give legal effect to any such intent, if it existed; since they had found, on the first issue, that the parties did not design that any clause giving effect to



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such intent should be inserted in the deed. This issue was framed by request of the Hudson Iron Company. If the propositions had been disjunctive, an answer to each might have been returned as above stated; but as the Hudson Iron Company chose to connect them, the jury, having doubt as to the first, returned the answer to the whole, that they could not agree. If it were plain that their doubt was as to both propositions, it is to be reasonably inferred that the court would hardly, upon their own view of the evidence, find such clearness and strength as to rest upon it the alteration of a written instrument.

The third issue, as found, settles that, before the delivery of the deed, the question had been raised and discussed, whether the reservation was limited, by the terms in which it was expressed, to ore to be used at the Stockbridge Iron Company's own furnaces; and that after this discussion the deed was accepted and delivered "with the mutual intention and understanding that it should be and was in the present form."

Therefore, as the first issue finds that it was not the intent of the parties that a clause should be inserted in the deed limiting and restricting the right to ore to be used in the Stockbridge Iron Company's furnaces, and the third issue finds that, after the discussion of the very question, the parties agreed that the deed should stand in its present form, the attempt now to insert the restriction must fail. If the findings are to stand (and they were satisfactory to the presiding judge, who refused a new trial) they are conclusive, and do not permit a reëxamination of the evidence by the full court. *Franklin v. Greene*, 2 Allen, 519. If the second proposition in the second issue could be proved, that the deed was "delivered by the Stockbridge Iron Company and accepted by the Hudson Iron Company, in the belief and with the understanding that it gave legal effect" to an understanding, existing at the time of delivery, that the reservation was restricted as alleged in the cross bill; still the fact found by the third issue, that, "after the question had been raised and discussed, whether the reservation was limited, by the terms in which it was expressed, to ore to be used in the furnaces of the Stockbridge Iron Company," the deed "was delivered by the

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Stockbridge Iron Company, and accepted by the Hudson Iron Company, with the mutual intention and understanding that it should be and was in its present form," must preclude the Hudson Iron Company from again raising the question. Kerr on Fraud & Mistake (1st Am. ed.) 428. *Eaton v. Bennett*, 34 Beav. 196. *Dodge v. Essex Insurance Co.* 12 Gray, 66, 72. *Andrew v. Spurr*, 8 Allen, 412, 416. *Farr v. Sheriffe*, 4 Hare, 512, 523. *McElderry v. Shipley*, 2 Maryl. 25, 35. *Norris v. Laberee*, 58 Maine, 260.

If it shall be the judgment of the court, that, as to the defences set up by the answer to the original bill, and as to the reformation sought by the cross bill, the Hudson Iron Company must fail, there remains the question whether the right reserved to the Stockbridge Iron Company is predominant over those of the Hudson Iron Company, or whether both stand on equal footing. The right claimed by the Stockbridge Iron Company is to sink shafts and mine the prescribed quantity of ore annually, in any part or parts of the premises, as may be most convenient and economical, without regard to the future extension of the operations of the Hudson Iron Company, but without waste or unskillfulness. This claim is in no way a derogation from the grant made by the deed. That grant excepts the right in question, limits the quantity and extent of its enjoyment, and provides for compensation for such enjoyment. It will not be questioned that this reservation is entitled to as favorable a construction as if the Hudson Iron Company had been owner of the premises, and made to the Stockbridge Iron Company a grant in its terms. Such a grant, making no restriction as to the parts of the premises in which it is to be enjoyed, would leave the grantee full power to select such as would be most convenient and economical for its enjoyment. That by virtue of the reservation the Hudson Iron Company's rights of mining are subordinate to those of the Stockbridge Iron Company is shown by assuming a possible future state of facts, that the ore-beds should approach exhaustion. Could the Hudson Iron Company proceed with its operations, and thus defeat its grant?

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*B. R. Curtis & B. F. Thomas, (T. P. Pingree, J. M. Barker & R. Olney, with them,)* for the Hudson Iron Company. I. *As to the case upon the original bill.* The clause in question, in the deed, was a reservation and not an exception. It newly creates a right to take from the land of the grantees ore of the grantees, paying therefor a stipulated price. The granting part of the deed conveyed not only all the land, but all the ore-beds contained therein. An exception of part of the ore would have been in direct conflict with the grant; which, by express words, had conveyed the whole. But the principles of the common law, which forbid an exception repugnant to a grant, allow a reservation to be made of some new right or interest issuing out of the thing granted.

The right reserved was not of any estate or property in the ore *in situ*. It was simply a license to mine for ore, and remove what should be thus gained. *Thomas v. Sorrell*, Vaugh. 330, 351. *Doe v. Wood*, 2 B. & Ald. 724. The grantor, by force of the reservation, has no exclusive or superior right. The license does not derogate from the grant anything more than its terms necessarily import, or restrain the grantee of the land and the ore from making such use of his property as the owner in fee may lawfully make. The reservation is not to be first served, to the exclusion or restraint of the grant in fee. The owner of such an incorporeal right not only has no property in the minerals, but his incorporeal right to search for and obtain them does not affect the right of the owner to mine *ad libitum*. *Lord Mountjoy's case*, Godbolt, 17; *S. C.* 4 Leon. 147; Moore, 174; 1 Anderson, 307; Co. Lit. 165 a. *Chetham v. Williamson*, 4 East, 469. *Marble Co. v. Ropley*, 10 Wallace, 339. *Grubb v. Bayard*, 2 Wallace, Jr. 81. *Johnstown Iron Co. v. Cambria Iron Co.* 32 Penn. State, 241. *Funk v. Haldeman*, 53 Penn. State, 229. *Sprague v. Snow*, 4 Pick. 54. Such an incorporeal right, though assignable, is not divisible or apportionable, and as soon as it is divided it is extinguished. *Caldwell v. Fulton*, 31 Penn. State, 475, 485. *Van Rensselaer v. Radcliff*, 10 Wend. 639. *Brooks v. Byam*, 2 Story, 525.

The words "for the use of the Stockbridge Iron Company," in the clause, were intended to limit the quantity of ore which might

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be taken under the reservation, by declaring the purpose for which it was to be taken. Thus construed, they have an appropriate meaning; otherwise they are useless. [GRAY, J. May they not have been inserted by analogy to the words "to his use and behoof forever" in the ordinary *habendum* clause of deeds?] The ordinary *habendum* clause is inserted to satisfy the statute of uses; but the statute of uses has no application to this reservation. Words are to be construed most strongly against the grantor. *Adams v. Frothingham*, 3 Mass. 352, 361. *Worthington v. Hylyer*, 4 Mass. 196, 205. 1 Shep. Touchst. 101. Shaw, C. J., in *Johnson v. Jordan*, 2 Met. 234, 240. And it is a settled rule that all the material surrounding circumstances, known to the parties, are to be taken into consideration by the court in construing doubtful expressions in a deed. Among these circumstances in this case, it is to be noted that the Stockbridge Iron Company was a corporation whose only legal capacity at the time was to manufacture iron in the town of Stockbridge. It was not a mining company, and had no power to mine and sell ore, but only to obtain it, in the language of the deed, "for its own use." St. 1841, c. 19. St. 1864, c. 291. *Whittenton Mills v. Upton*, 10 Gray, 582, 595. And it is further to be noted that to use ore to manufacture iron in the town of Stockbridge charcoal was necessary; and it was known to the parties that its supply was becoming more and more restricted and expensive, and that it was not reasonably to be anticipated that this manufacture could long be prosecuted by this company under its act of incorporation. Under these circumstances, a right to take ore simply as the property of the taker, and a right to take it for its own use in its furnaces, were very different things. The first would be of indefinite duration; the last might reasonably be expected to find, as it did, an early termination.

This interpretation is agreeable to the nature of the right reserved. If the words of the reservation had been "for the use of the Stockbridge Iron Company, in its furnaces in the town of Stockbridge," it would have been in entire accordance with similar grants and reservations under the common law; and no one would contend that ore could be taken for any other use, any

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more than, if wood is reserved for a particular house, or water for a particular mill, the thing reserved could be taken for any other than the designated use. But the special use may be designated by any words which, when applied to their subject matter, fairly designate it. And if the Stockbridge Iron Company had no legal capacity to use the ore except in its furnaces in Stockbridge, the omission of the words "in its furnaces in Stockbridge" is an omission to express what the law expresses, for the corporation had legal capacity to use the ore in no other way.

There is another view, drawn from the reason of that rule of the common law which holds such a right to be indivisible, because to allow it to be divided might increase the capacity of its owners to take the *profit a prendre* to which it relates; or as Lord Coke expresses it, to allow the right to be divided might work a surcharge and prejudice to the tenant of the land. Co. Lit. 165. *Brooks v. Byam*, 2 Story, 525, 546. When the reservation was made, the Stockbridge Iron Company had no legal capacity to mine for and use ore, save for the supply of its furnaces in Stockbridge. St. 1841, c. 19. But by the St. of 1864, c. 291, it was authorized to mine ore for manufacture or sale, and to manufacture on the banks of the Hudson River. So far as respects this reservation, the legal capacity of the person to use it was thus materially changed and enlarged; and this change and enlargement not only may increase the capacity of the reservee, and so tend to a surcharge and prejudice of the tenant of the land, but that was its avowed object. And the amendment of the charter both affords decisive evidence of the original limited capacity of the corporation, if any such were needed, and also conclusively manifests an intention indefinitely to enlarge it. The capacity of the corporation to be the owner of the reservation was thereby destroyed. The corporation became as incapable of holding it, as two or more natural persons would be incapable of holding it in equal moieties.

The scope of the original bill is to obtain a declaration of the rights and duties of the parties, and a decree specifically to enforce them. A court of equity, except in some special cases of trustees applying for directions, never makes a declaration of

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rights save as preliminary to such a decree. Unless the court, upon this bill, can make a decree for the specific enforcement of all the respective rights of the parties, it will make no decree except to dismiss the bill and leave the parties to their action at law. And in this connection it is pertinent to observe, that the rights and duties of each party depend entirely upon a strictly legal title created by the reservation. The question whether the bill can be maintained depends, therefore, on the further question whether a court of equity can undertake specifically to enforce the respective rights and duties of these parties to mine for ore in the land. This can only be done by retaining the suit in court indefinitely, and from year to year making the necessary inquiries and passing the necessary orders. Taking the title of the Stockbridge Iron Company to be only an incorporeal right to mine for not exceeding seven thousand five hundred tons annually, while the owner of the fee has also the right to mine *ad libitum*, it is impossible to regulate the concurrent exercise of these rights by a prospective decree. *Gervais v. Edwards*, 2 Drury & Warren, 80. *Hills v. Croll*, 2 Phillips, 60. *Booth v. Pollard*, 4 Y. & Col. Exch. 61. *Pollard v. Clayton*, 1 Kay & Johns. 462. *Blackett v. Bates*, Law Rep. 1 Ch. 117. *Marble Co. v. Ripley*, 10 Wallace, 339. *Port Clinton Railroad Co. v. Cleveland & Toledo Railroad Co.* 13 Ohio State, 544.

It has already been submitted that the reservation in the deed poll takes effect by reason of the intent of the grantor declared in the reservation, and the assent thereto of the grantee conclusively manifested by its acceptance of the deed and entry under it. In the language of Shaw, C. J., in *Newell v. Hill*, 2 Met. 180, 181, "a deed poll, when accepted by the grantee, becomes the mutual act of the parties, and a stipulation on the part of the grantee, though it cannot be declared on as his deed, yet by force of his acceptance is a valid contract on his part, by which a right may be reserved or granted, or upon which a suit may be maintained." It is of no importance whether the right in question is created by some formal stipulation of the grantee to do something, or by his assent that the grantor shall take something. In each case, it is the assent of the grantee, by force of which there is a valid con-

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tract, by which a right may be reserved or granted, or on which a suit may be maintained. And this bill is founded on the assent of the grantee that the grantor may take something from the land granted, which assent made a valid contract on his part to that effect. It is settled law that a court of equity will not compel one of the contracting parties to do or suffer anything not included in the contract as he actually understood it when he assented to it. *Western Railroad Co. v. Babcock*, 6 Met. 346. *Wycombe Railway Co. v. Donnington Hospital*, Law Rep. 1 Ch. 268. *Malins v. Freeman*, 2 Keen, 25, 34. *Ball v. Storie*, 1 Sim. & Stu. 210. Snell Eq. 441, 442. Whatever doubt there may be respecting the question of mutual mistake raised by the cross bill to reform the deed, the proof is complete that, when the Hudson Iron Company accepted the deed, the reservation was understood by the grantees to be limited to a use by the Stockbridge Iron Company of the ore in its furnaces at Stockbridge. To maintain this bill, the purpose of which is to establish a right to mine for ore to be used in furnaces elsewhere, would be a violent departure from the understanding of the reservation by the Hudson Iron Company when it assented to the reservation. In such a case, the plaintiff should be left to its remedy at law.

II. *As to the case upon the cross bill.* If the defence of laches might ever have been made, the Stockbridge Iron Company has waived and lost the right to set it up, by omitting to do so till the time of filing the amended answer. That answer was allowed to be filed against the objection of the Hudson Iron Company and without prejudice to its rights; the matter being reserved for the full court. And the amendment should now be disallowed, and the defence of laches excluded from the case. 1 Dan. Ch. Pract. (3d Am. ed.) 780, 782. *Western Reserve Bank v. Stryker*, Clarke, 380. *Campion v. Kille*, 1 McCarter, 229, 232. *Percival v. Caney*, 14 Jur. 473. 1 Dan. Ch. Pract. (5th ed.) 681. Story Eq. Pl. § 760. *McDougal v. Purrier*, 4 Russ. 486. *Tarbell v. Bowman*, 103 Mass. 341. *Merchants' Bank v. Stevenson*, 7 Allen, 489. *Hancock v. Carlton*, 6 Gray, 89.

If the defence were now open, still upon the facts in proof the plaintiffs have not been guilty of laches. Mere assertions of a

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claim, unaccompanied by any act to give it effect, have no tendency to put a party in default in not resorting to legal proceedings. See *Clegg v. Edmondson*, 8 De Gex, Macn. & Gord. 787; *Lehmann v. McArthur*, Law Rep. 3 Ch. 496; Fry Spec. Perf. § 744. And it is well settled that a party is not bound to rush into litigation, if there is a reasonable chance of securing his rights without it; and that the pendency of negotiations for the settlement of a controversy will excuse any apparent delay in the resort to legal proceedings. *Southcomb v. Bishop of Exeter*, 6 Hare, 213. *Lehmann v. McArthur*, Law Rep. 3 Ch. 496. *McMurray v. Spicer*, Law Rep. 5 Eq. 527, 537.

The case at bar is analogous to that class of cases in which it has been held that the defence of laches has no application, the plaintiffs being in possession under an executed contract, and enjoying all the fruits of that contract, relying on their equitable title, and the object of the suit being simply to have the legal title perfected. See *Crofton v. Ormsby*, 2 Sch. & Lef. 583, 604; *Clarke v. Moore*, 1 Jones & Lat. 723; *Sharp v. Milligan*, 22 Beav. 606; *Waters v. Travis*, 9 Johns. 450.

If the Hudson Iron Company has a plain equity for the reformation of this deed, it ought not to be deprived of it by mere lapse of time, unless its inaction during such time has deceived somebody, and thereby led somebody to change position injuriously. *Ex parte Williams*, Law Rep. 10 Eq. 57, 59. See *Tarbell v. Bowman*, 103 Mass. 341; *Welles v. Yates*, 44 N. Y. 525, 531; *Bidwell v. Astor Insurance Co.* 16 N. Y. 263.

The case of the cross bill, on the report of the presiding judge, is still open upon the second issue. The whole court had ordered an issue of fact to be sent to the jury. Upon the application of the Hudson Iron Company for a second issue, the question was referred to the justice who should hold the jury term, and he granted the application, and his order granting it has not been revoked. It is the only issue which the Hudson Iron Company then regarded, or now regards, as material on the cross bill. There has been no verdict upon it, and it stands as if it had never been tried. As to it, there is and can be nothing for the action of the whole court, save the question whether the order allowing it shall



be revoked. And the only ground upon which this court can revoke that order is, that the finding of the jury upon the first and third issues renders the second immaterial. But the reverse of this is true. With a verdict for the Hudson Iron Company upon the second issue, the first and the third are immaterial.

The second issue covers the whole ground ; the common intent and understanding of the contract, and the common understanding and construction of the deed. To inquire, as called for in the first issue, whether the parties intended to insert a clause (other than that in the deed) to limit the reservation, and omitted to do so by mistake, is of no moment. Of course they did not, if they delivered and accepted the deed in the belief and with the understanding that, as written, it accomplished their purpose and gave legal effect to their common understanding, intent and agreement. Nor is the third issue, whether the question as to the effect of the reservation in the deed, as written, was mooted and discussed between the parties, of moment, if the result of the discussion was that the deed was delivered and accepted in the belief and with the understanding of both parties that it was so framed as to give legal effect to the intent and understanding of both parties in the contract of purchase and sale. The finding in the third issue has no tendency to show that after the discussion there was any difference of opinion as to the legal construction and effect of the deed as written. The presumption from delivery and acceptance after discussion is, that the deed was deemed right as it stood. The third issue suggests no discussion as to the terms of the sale, but is confined to the terms by which the reservation is expressed in the deed.

The presiding justice erred in sending the third issue to the jury, and his order sending it should be reversed. No request was made by either party that such an issue should be framed ; and no intimation of such an issue was given till the evidence on both sides was closed. It does not obviate the objection, to say that further time was not asked to put in further evidence. The case had been prepared and the evidence taken without any view to such an issue. There is no resemblance between the trial of special issues in equity and the trial of cases at common law. In

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the latter, the parties are expected to be prepared to try the whole case. Questions put by the presiding judge to the jury are upon points within the scope and range of the trial. But the issue in equity is carefully framed by the court, and the parties are strictly limited to evidence touching it. The general merits of the case are not open to evidence or argument; and it would be a sufficient reason to exclude and forbid either, that it does not bear upon the precise point which the issue involves. The only question on this point would seem to be, whether the third issue was so connected with and dependent upon the second, that the parties should have been prepared for it.

As to the instructions to the jury upon the burden of proof, the court, so far as the issues were concerned, had treated the original bill and cross bill as one proceeding, and declined to grant the Hudson Iron Company issues on the original bill, because they were allowed on the cross bill; 102 Mass. 45, 49; and we are therefore, to find a rule applicable to the defence set up in the original bill and the prayer for reformation in the cross bill. In the original bill, the Stockbridge Iron Company invokes the aid of equity to give effect to the reservation in the deed. The Hudson Iron Company answers that to do so would be against equity, for by the original understanding and agreement of the parties the right reserved was a qualified right, and no longer exists. There is no rule of equity which requires such a defence to be established beyond a reasonable doubt. The rule should be, on the contrary, that unless the plaintiff shows, upon the whole evidence, that he has an equitable as well as legal claim, a court of equity will not interfere. Weight may be given to the presumption arising from the written instrument, but the burden is not shifted. If it be said that a more stringent rule obtains in the reformation of contracts; then, as to the equitable defence to the original bill, the Hudson Iron Company should have an issue under the less stringent rule.

But the instructions, as applicable to the cross bill, were erroneous. The rule laid down as to the burden of proof, and the explanation of the rule, are applicable in criminal cases only, and from considerations which do not obtain in civil cases. See *Com-*

*monwealth v. Webster*, 5 Cush. 295, 320. For, though the facts to be proved in civil cases may be the same as in criminal, (as in a suit upon a note where the defence is that it has been forged, or in a libel for divorce on the ground of adultery,) the rules as to the burden or amount of proof are never imported from the one to the other. Yet the matters thus noticed are of far greater moment than any question of property merely. The rule, as laid down, is not reasonable. It is impossible, by any abstract rule, to measure the strength of the presumption arising from the signatures and seals of the parties, or from the acceptance of a deed, and then say how much evidence is necessary to overcome it. It is a question of fact, depending upon the relations of parties, the confidence reposed by each in the other, and all the circumstances of the transaction. The rule cannot be extended to civil causes, without obstructing the course of justice. No explanation, comment or gloss can make it intelligible to the jury. It is only when the phrase "beyond reasonable doubt" has been neutralized by the commentary, that it ceases to confuse and mislead; and this seldom or never occurs. Nothing was required on these issues but such evidence as satisfied the judgments of the jury. This may not be mere preponderance, but such preponderance as convinces the understanding. The instructions were applicable only to the first issue, and were not appropriate to the second.

The question has not been settled; the remarks of the chief justice in the 102 Mass. 45, 49, were *obiter dicta*; no such point was raised in the cause or involved in its determination. The question before the court then was, whether issues should be granted, not how they should be tried.

WELLS, J. The verdict upon the first issue defeats the position of the plaintiff in the cross bill, so far as it rests upon the ground of an omission to insert in the deed any clause or provision agreed upon or intended to be inserted. The only question now before us, relating to that issue, is of the correctness of the instruction to the jury, "that the ordinary rule of evidence in civil actions, that a fact must be proved by a preponderance of evidence, did not apply to such a case as this; that the proof that both parties intended to have the precise agreement between

them inserted in the deed, and omitted to do so by mistake, must be made beyond a reasonable doubt, and so as to overcome the strong presumption arising from their signatures and seals that the contrary was the fact ; and that in this case proof beyond a reasonable doubt was such a degree of proof as the jury would act upon in the most important affairs of life, and as would satisfy their judgments and consciences of the fact to be proved."

This is in precise accordance with the rule as stated in the opinion of the court upon the former hearing of this case. 102 Mass. 45. That statement was not *obiter dictum*, as it is now contended on the part of the plaintiff. It was involved in the question whether to submit the issue to a jury, which was a question of judicial discretion. In order to determine it, the court were necessarily led to consider whether, and in what mode, the verdict of a jury could be made an equivalent for that completeness of proof which is required in all such cases as the foundation of judicial interference in equity. It has always been held in courts of chancery, that, in order to reform a written contract, and make it conform to a variant oral agreement, the proofs must be full, clear, and decisive ; free from doubt or uncertainty ; such as entirely to satisfy the conscience of the chancellor. This well established and salutary principle constitutes the difficulty of submitting such cases to a jury ; the office of whose verdict is to inform and satisfy the conscience of the court. A verdict rendered upon mere preponderance of evidence would not do this. In order that a verdict, in cases of this nature, may answer its legitimate purpose, we know no better or safer rule than that laid down at the trial.

At the trial, upon motion of the plaintiff in the cross bill, and against objection by the defendant, a second issue was allowed to be submitted to the jury. This issue presented in substance the claim of the plaintiff that, at the time of the delivery of the deed, both parties alike understood that the legal effect of its terms, as written, was to restrict the mining rights of the grantor to the supply of its furnaces at Stockbridge ; and that such was in fact the real agreement upon which the deed was given and accepted.

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The jury failed to agree upon this issue ; and one question to be decided is, whether the court can proceed to a decree until a verdict has been reached upon this issue also. The question is twofold : 1st. Whether the fact involved in the issue is essential ; 2d. Whether the court may determine the fact without a jury, upon the evidence as reported, together with that taken and reported by a special master appointed for the purpose upon the original bill.

The question may be somewhat modified by the verdict of the jury upon the third issue, namely, " Was the deed of the land and ore-bed delivered by the Stockbridge Iron Company and accepted by the Hudson Iron Company, with the mutual intention and understanding that it should be and was in its present form, after the question had been raised and discussed between the parties whether the reservation to the Stockbridge Iron Company was limited, by the terms in which it was expressed in the deed, to ore to be used at its own furnaces ? "

This issue was suggested by the course of the trial, and was submitted by the presiding justice in order to determine a question of fact, upon the proof of which the defendant insisted that the second issue became immaterial. We are unable to see that the plaintiff could have been prejudiced in any way by the direction of the court, before the closing arguments, that this additional question should be passed upon by the jury. It was incidental to, and in no respect diverse from the other issues tried. It was in a measure involved in the others. It grew out of, and would be determined upon the same evidence. The plaintiff did not, at the time, suggest that other or different evidence would be applicable, or that it existed. The second issue had been ordered upon the plaintiff's motion, after the parties had come together, with their witnesses and proofs, for the trial of the first, and against the objection of the defendant. Upon that issue a question of law was raised, which, in the judgment of the presiding justice, rendered the third issue proper and expedient for its determination. The objection of the defendant does not appear to us to be well founded or reasonable. The whole matter was one of judicial discretion ; and although, as such, it is open

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to revision in equity, we find no ground on which the propriety of the exercise of that discretion in this particular can be fairly impeached.

If the second issue was immaterial, or has become so by reason of the findings of the jury upon the other two; or if, for any reason, it ought not to have been submitted to the jury, it is competent for the court to disregard it in the further disposition of the case. It becomes necessary, therefore, to examine the precise position of the case, and the nature of the questions remaining undetermined.

As it now stands, after verdict upon the first and third issues, it is established that the deed is, in form and language, precisely what the parties intended it should be; that the plaintiff accepted it with full knowledge of the form in which its provisions were expressed, and that too after discussion of the very question whether it restricted the grantor in the manner in which it is now claimed that it should do. But it is contended that both parties then understood alike that the deed, in its present form, did so restrict the defendant; and that there was a previous oral agreement between them for the sale of the land, by the provisions of which the defendant was to be so restricted. These questions are presented by the second issue.

It will be seen that there is a question thus presented by both branches of the issue, when taken together, which is not merely of a mutual mistake of law as to the construction and effect of the deed; but whether, by reason of such mutual mistake, the deed, contrary to the real intention of both parties, failed to be a full and complete execution of the previous contract of purchase and sale. Such a mistake, if there are no legal objections to the enforcement of the oral agreement, will furnish sufficient ground for the interference of a court of equity to require a rectification of the deed. *Canedy v. Marcy*, 13 Gray, 373. *Hunt v. Roussimaniere*, 1 Pet. 1, 13. 2 Lead. Cas. in Eq., notes to *Woollam v. Hearn*, 680. Story Eq. § 115. Kerr on Fraud & Mistake (1st Am. ed.) 418-421.

The foregoing proposition excludes the case of an instrument adopted by the parties as a modification of or substitute for a pre-

vious agreement, or where it was not intended fully or exactly to conform to the agreement. It also excludes the case of a deed given and accepted as the result of previous negotiations, where the precise terms of the sale and proposed conveyance had not been settled and agreed upon previously, or otherwise than by the written instrument itself.

Upon the ground of mistake, it embraces only the case of a completed oral or other precedent agreement; a deed intended to conform to it and carry it into effect according to its precise provisions; delivery and acceptance of the deed with the mutual supposition that it did so conform to the agreement. This ground of relief assumes that the deed is in form as it was intended and understood to be when accepted; the mistake consisting in the erroneous supposition that in fact and legal effect it corresponded with the oral agreement.

The third issue is not inconsistent with this position of the plaintiff; and the verdict upon it does not render the question presented by the second issue immaterial.

The objection that the second issue couples together two distinct questions is not tenable. The issue, in its legal aspect, is single; though it depends upon two propositions of fact, namely, a previously subsisting oral agreement, and a deed, intended to carry the agreement into effect, but, by mistake and misunderstanding of the legal construction of its terms, failing to do so.

Upon examining the plaintiff's bill, we do not find any distinct or sufficient allegation of such an agreement, independently of the deed itself. Without it, the fact that both parties understood that the legal construction and operation of the deed would be otherwise than what it is now held to be, would not warrant its rectification to make it conform to that supposed meaning. Mistake of law alone is not sufficient. There must be some agreement of the parties, distinct from the written instrument, to which the instrument may be made to conform. It may be otherwise when the alleged error is not in respect of the subject matter of the contract, but in some incidental clause of restriction or condition. But in the present case it affects the subject matter of the grant.

Nevertheless, as the defect of pleading has not been taken advantage of by demurrer, nor presented as a special objection to the issues, and the trial and argument have proceeded as if there were sufficient allegations in the bill in this particular, we are disposed to treat the case accordingly. The defect is amendable; and an amendment, under such circumstances, would be allowed, even at this stage of the proceedings.

Against the bill, so amended, we have to consider the defence of the statute of frauds. This defence indeed goes to the whole scope and purpose of the bill, and if maintained, renders all the issues of no avail.

The position of the defendant is, that the clause in controversy is one of exception, and not of reservation, in a technical or legal sense. The question turns upon this distinction. If the defendant's mining rights are regarded as new rights, derived from its grantee under a reservation in the deed, then the operation of the clause, by which those rights were acquired, may be restricted in equity, without violation of the statute of frauds. A title or right acquired by the grantor, by reservation in a deed poll, stands in this respect upon the same footing as that which is acquired by direct grant or conveyance. But whatever is excluded from the grant by exception remains in the grantor as of his former title or right; and to modify the deed so as to limit and reduce that, either in extent or duration of the estate or right retained, is in effect to enlarge the operation of the deed and make it convey estate, title or rights which the written instrument will not operate to convey. This is contrary to the statute of frauds. *Glass v. Hulbert*, 102 Mass. 24.

The court are of opinion that the clause in the deed from the defendant to the plaintiff corporation, "reserving to the Stockbridge Iron Company the right of mining on the above granted premises, for the use of said company, an amount of ore not exceeding seven thousand five hundred tons annually, at a duty of thirty-seven and a half cents per ton, including all the facilities needful for doing the same," must be construed as a reservation of new rights to the grantor, out of the granted premises; or else as the creation of such new rights by force of words of reserva-



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tion, taking effect either by way of estoppel, or as a grant from the grantee by implication of law from the acceptance of the deed. Cruise Dig. tit. 32, c. 21, § 65; 2 Greenl. ed. 347, note upon *Thompson v. Gregory*, 4 Johns. 81. Washburn on Easements, c. 1, § 2, p<sup>1</sup> 5, referring to *Durham & Sunderland Railway Co. v. Walker*, 2 Q. B. 940, and *Wickham v. Hawker*, 7 M. & W. 63. *Doe v. Lock*, 2 Ad. & El. 705; *S. C.* 4 N. & M. 807. *Dyer v. Sanford*, 9 Met. 395. *Simonds v. Wellington*, 10 Cush. 313. *Vickerie v. Buswell*, 13 Maine, 289.

The property in the mines themselves, and in the ore they contained, must be held to have passed to the grantee by the deed. That which is reserved to the grantor is a license to enter upon the granted premises and exercise certain rights therein for the purpose of extracting from the mines a limited quantity of the ore, and revesting in the grantor the property in that which is thus separated from the mass. But until the ore is thus separated and become personal property, the title and legal possession of the whole rests in the grantee. The right of the Stockbridge Iron Company is an interest in land; but it does not constitute a title to any specific part of the mines, or of the ore contained in them, either as real or personal property. Neither is it such an interest as can be separated or made specific in any other mode than by the exercise of the privileges defined in the clause of reservation. Until then it is indefinite and inoperative. *Thompson v. Gregory*, 4 Johns. 81. *Dygert v. Matthews*, 11 Wend. 85.

The substance of the reservation or implied grant does not consist in the easements secured to the grantor, but in the right to extract ore and thereby acquire title and possession thereof. The easements are merely incidents, as means to this end.

The reservation of an exclusive right of this nature might be held to retain in the grantor the property in the mines, operating as an exception from the grant. *Cardigan v. Armitage*, 2 B. & C. 197; *S. C.* 3 D. & R. 414. *Farnum v. Platt*, 8 Pick. 339. *Munn v. Stone*, 4 Cush. 146. *Jamaica Pond Aqueduct Co. v. Chandler*, 9 Allen, 159. But this right is not exclusive. There is nothing in the deed to restrict the grantee from working the mines at the same time, even to the entire exhaustion of the ore. Bainbridge on Mines (1st Am. ed.) 269.

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The stipulation for a rate of duty by the ton, to be paid by the grantor, for all ore that should be mined, favors the construction of the clause as a reservation, rather than as an exception; or at least as a right to be held and exercised by the Stockbridge Iron Company as one derived from the Hudson Iron Company, rather than one carved out of the former estate of the grantor, and withheld from the operation of the grant. The payment of such a duty is a recognition of the title of the party to whom it is to be paid, and indicates acquisition by the other.

In this view of the source of the defendant's rights, it is immaterial to this inquiry whether they arise by force of a reservation strictly, or by estoppel, or by implied grant. In either case, they are equally open to be restricted by rectification of the clause upon which they depend.

Such being our conclusion upon this point, it follows, as already indicated, that a material issue remains to be tried. As to that issue, the order for trial of the case by jury is unexecuted.

We do not think the defence of laches ought to defeat the bill, in this aspect of the case. If the assertion and attempted exercise of rights of mining, by the defendant, after ceasing to carry on its business at Stockbridge and selling its furnaces, was notice to the plaintiff of the claim now made by the defendant, still, supposing this issue to be found for the plaintiff, it was notice of a claim inconsistent not only with the original agreement, but also with the terms and legal effect of the deed, as originally understood by both parties. That the plaintiff adhered to the understanding and construction which had been common to both, and relied upon that construction of the deed as a sufficient answer to the claims thus made, is not to be imputed as laches, by the defendant, without proof that the plaintiff had become aware of the mistake, or ought to have discovered it, and was guilty of neglect in not doing so and seeking the remedy sooner. It is a sufficient answer to any such position, that the true construction of the clause is a matter of serious controversy and learned argument by counsel in this case.

If this construction, now sought to be established by the Hudson Iron Company, is the true one, the issues are all inappropriate, and the cross bill itself without foundation. The issues

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were framed, at the request of the Hudson Iron Company, upon the contrary assumption. But as the question was not then argued, and as it goes to the foundation of both suits, it should be now considered.

It is contended that the language, "for the use of said company," is a restriction upon the exercise of the rights reserved to the grantor, limiting the purposes for which alone mining could be done; that, as the Stockbridge Iron Company at that time was authorized only to manufacture pig iron at Stockbridge, and to work mines only for its own use, these limits of its corporate powers are to be imported into the deed, and thus furnish the measure of those purposes. Upon this construction, the rights would not be assignable, and would have ceased or become suspended when the Stockbridge Iron Company ceased to carry on its business of manufacture at Stockbridge, and sold its furnaces.

But we cannot give so restricted a construction, even against a grantor, to language which is so commonly employed in conveyances, and thereby has acquired a well known significance. When so employed, the phrase is expressive of the right of appropriation or enjoyment, rather than descriptive of the purposes or mode of the use. It does not call for any extrinsic aid for its interpretation.

The meaning contended for is not the natural and ordinary one; there is nothing in the context, or in the application of the language to the subject matter, which creates an ambiguity; and we think the facts in regard to the corporate powers of the grantor, and the entertained purpose of discontinuing its business, are so far extrinsic as not to be competent to raise an ambiguity for the purpose of settling it against the more obvious sense of the terms used.

Until the remaining issue has been again submitted to a jury by itself, we do not deem it necessary or expedient to proceed further with the original bill, or to consider the several other questions that have been argued before us.

The case will therefore stand for trial by jury upon that issue in the cross bill when amended; and in that trial the facts established by the verdict upon the other two issues will be taken as conclusively settled between the parties.

*Ordered accordingly.*

**CASES**  
**ARGUED AND DETERMINED**  
**IN THE**  
**SUPREME JUDICIAL COURT**  
**FOR THE**  
**COUNTIES OF HAMPSHIRE AND FRANKLIN, AT**  
**GREENFIELD, SEPTEMBER TERM 1871.**

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**PRESENT:**

<b>HON. REUBEN A. CHAPMAN,</b>	<b>CHIEF JUSTICE.</b>
<b>HON. HORACE GRAY, JR.,</b>	} <b>JUSTICES.</b>
<b>HON. SETH AMES,</b>	
<b>HON. MARCUS MORTON,</b>	

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**HAMPSHIRE COUNTY.**

**ANNA B. WHITE vs. WASHINGTON GRAVES & another.**

**On the trial of an action to avoid a deed upon the ground of mental incapacity of the grantor at the time of its execution, evidence of the condition of his mind a year afterwards may be excluded, in the discretion of the judge, as too remote.**

**If a married woman, mentally competent, joins in a deed of land by her husband, to release her dower, without duress or fraudulent misreading of the deed, and suffers it to be delivered to the grantee, she cannot avoid it on the ground that she was induced to join by fraud or undue influence of her husband or another co-grantor, without showing complicity of the grantee.**

**WRIT OF DOWER, dated August 18, 1869, wherein an insane woman, by her guardian and next friend, claimed dower in lands in Hadley, under the Gen. Sts. c. 107, § 38, and c. 135, § 9, after her divorce from her husband, David White, for the cause of his adultery. The tenants pleaded the general issue, and specified that Elijah White and the said David White were owners in common of the demanded premises, and conveyed the same to**

the tenants on February 22, 1867, by deed of that date, with full covenants of warranty of title and against incumbrances, and that the demandant, as wife of the said David, joined with them in the deed and thereby released her right of dower.

Trial and verdict for the tenants, in the superior court, before *Pitman*, J., who allowed a bill of exceptions, the material parts of which are comprised in the following statement :

It appeared, at the trial, "that the tenants neither employed counsel nor directed the defence of the suit, but that Elijah White employed counsel and instructed them and was active in procuring the witnesses and otherwise preparing the case."

It was proved that the demandant was married to David White in 1853, and was divorced from him at April term 1869 of this court in this county, for the cause of his adultery ; the deed set up by the tenants was put in evidence ; and the demandant sought to avoid it on the ground that her execution of it "was of no effect by reason of her mental incapacity, and of undue advantage taken by the parties to the deed to obtain her signature at a time when her mind was weak and easily and unduly induced thereto, and that the grantees were knowing to the incapacity and undue influence exerted by the grantors in obtaining her signature."

Upon these issues, the demandant introduced evidence tending to show that for many years before 1867 she and her husband and their children, and Elijah White and his wife and children, constituted one family ; that she was an epileptic during all the time, and that her fits of epilepsy became more frequent and severe, until at the date of the deed she was in a state of confirmed dementia ; and the tenants introduced evidence tending to show that until some time after the date of the deed her mental capacity was unaffected in the intervals between the fits.

At the close of the demandant's evidence, she sought to introduce a portion of a deposition of Franklin Bonney, a physician, "for the purpose of showing the conduct and admissions of Elijah White as one of the parties warranting title to the defendants and fraudulently combining with David White, as alleged, to procure the signature of the plaintiff to the deed by undue influence ;" but the judge excluded it. By a copy of it, annexed to the bill of

exceptions, it appeared that the conduct and admissions of Elijah White, thus sought to be proved, related to the state of the demandant's mind in the latter part of February 1868.

In his closing argument to the jury, the demandant's counsel contended that the demandant was entitled to a verdict, (1) on the ground that she was mentally incompetent to execute the deed, and (2) on the ground that, being weak in mind, she was unduly influenced to sign it. The judge submitted the case to the jury upon the first position with instructions to which no exception was taken, and ruled that there was no evidence to go to the jury in support of the second position. The testimony of many witnesses upon this position was set forth in the bill of exceptions, and the substance thereof is stated in the opinion.

*C. Delano*, for the demandant.

*G. M. Stearns & W. Allen*, for the tenants.

GRAY, J. The demandant has no ground of exception to the rulings of the superior court upon either of the issues made at the trial.

1. Upon the issue of her mental condition at the time of the execution of the deed in which she joined as a grantor in February 1867, the case was submitted to the jury under instructions to which no exception was taken, and the only evidence excluded was of declarations of Elijah White as to her condition in February 1868. Assuming that Elijah White stood in such a relation to this action that his declarations were admissible in evidence against the tenants, evidence of the demandant's state of mind a year after the deed had been executed might well be rejected by the presiding judge, in his discretion, as too remote in point of time to have any weight upon the question what her mental condition had been when she executed the deed. *Shailer v. Bumstead*, 99 Mass. 112, 130. It is therefore conclusively established by the verdict that the demandant at the time of executing the deed had sufficient mental capacity for the purpose.

2. Upon the issue of undue influence, none of the evidence introduced or offered had any tendency to show duress or compulsion of the demandant, or that the deed was misread to her, or that either of the grantees knew of or participated in any influence

exercised by the other grantors upon her. A deed procured by fraud or undue influence is not wholly void ; and it was long ago decided by this court, upon great consideration, that a person who voluntarily executed a deed, although induced to do so by fraud, could avoid it only as against the party who exercised the unlawful influence, or against one who took title under the deed with participation in or notice of the fraud, and not against one who took a title apparently good from those having capacity to convey. *Somes v. Brewer*, 2 Pick. 184. The case at bar does not require us to consider how far the same rule might be applicable to a grantor who acted under duress, or who never actually consented to the deed, as in the case of a person made so intoxicated as not to know what he was about, or of an unlettered person to whom the deed was not read at all or was read wrong by fraud, or of a person wanting in mental or legal capacity, like an insane person or an infant. See 2 Pick. 194, 197, 203, 204 ; Keilw. 154 a ; *Thoroughgood's case*, 2 Co. 9 ; Shep. Touchst. 61 ; *Worcester v. Eaton*, 13 Mass. 371 ; *Vinton v. King*, 4 Allen, 562 ; *Dodd v. Cook*, 11 Gray, 495 ; *Putnam v. Sullivan*, 4 Mass. 45, 54 ; *Jackson v. Hayner*, 12 Johns. 469 ; *Foster v. Mackinnon*, Law Rep. 4 C. P. 704 ; *Schuylkill County v. Copley*, 67 Penn. State, 386 ; *Gibbs v. Linabury*, 22 Mich. 479 ; *Gibson v. Soper*, 6 Gray, 279 ; *Bartlett v. Drake*, 100 Mass. 174.

By the common law of England, a wife could not release her dower by deed ; but, according to the better opinion, she might be barred of it by judgment recovered against her husband for the land, unless such judgment was procured by collusion between him and the demandant. Britton, 261 a. 2 Inst. 347, 349, 350. Co. Lit. 357 b. By the law of this Commonwealth, she is capable of releasing her dower by joining in the deed of her husband, without any separate examination of or acknowledgment by her before a magistrate. *Fowler v. Shearer*, 7 Mass. 14. *Catlin v. Ware*, 9 Mass. 218. *Page v. Page*, 6 Cush. 196. Gen. Sts. c. 90, § 8 ; c. 89, § 18. For the purposes of executing such a deed, she has as full power as an unmarried woman would have to execute a deed of her land ; and if, being of sufficient mental capacity, and without duress, or misrepresentation as to the nature of the

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instrument, she joins in such a deed and suffers it to be delivered to the grantee, she cannot afterwards avoid it, on the ground that she was induced to execute it by fraud or undue influence of her husband, or of another co-grantor, without showing that the grantee knew or participated in the fraud.

This essential link in the chain of proof necessary to defeat the tenants' title was wholly wanting. It was therefore rightly ruled that there was no evidence to go to the jury in support of the demandant's position that her signature to the deed had been obtained by undue influence. *Exceptions overruled.*

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HARRIET W. HARRINGTON vs. ANSON HARRINGTON.

On a trial by jury of a libel for divorce for the cause of adultery, at which the libellant, the libellee and the alleged paramour of the libellee were all witnesses, the judge instructed the jury that formerly it was thought unsafe to permit parties to testify, for fear that in the infirmity of human nature they would not tell the truth; that criminals especially were formerly not allowed to testify in their own behalf, because it was said by many that it would be a mere farce to allow them to do so, that a man who committed a crime would surely lie about it, a man charged with adultery would swear he was not guilty, to shield himself, and, under a false sentiment of honor, to screen his paramour, and a woman who was so depraved as to commit adultery would have no other course but to deny it, for to stay away would be confession; and that, in view of these suggestions, such testimony was to be received with care; but that the questions of fact and the credit due to witnesses were solely for the jury, and he intended to express no opinion in regard to them. *Held*, that the instructions afforded the libellee no ground of exception under the Gen. Sts. c. 115, § 5, as a charge to the jury with respect to matters of fact.

It is discretionary with the court, on the trial of a libel for divorce for the cause of adultery, to order further specifications of the alleged criminal act.

It is discretionary with the court to allow a libel for divorce to be amended without ~~costs~~ during the trial.

LIBEL, filed July 13, 1870, for a divorce from the bond of matrimony for the cause of adultery committed by the libellee with Elizabeth Morse "at sundry times" since the marriage of the parties, "and at sundry places" to the libellant unknown; for the cause of extreme cruelty "since the marriage;" and for the cause that the libellee, "though he is of sufficient ability, grossly, wantonly and cruelly refuses and neglects to provide suitable maintenance" for the libellant.



By order of the court, upon motion of the libellee, the libellant filed specifications under each of her charges. The specification under the charge of adultery was: "Various acts of adultery by the libellee with said Elizabeth Morse during and within the time said Elizabeth Morse lived at Northampton and in the house of the libellee, to wit, in the years 1867, 1868 and 1869." That under the charge of extreme cruelty was: "Extreme cruelty within and during the time between January 1, 1869, and March 1, 1870, by neglect to provide suitable food and clothing, fuel and care." And that under the charge of insufficient maintenance was: "Neglect to provide suitable maintenance between January 1, 1868, and the day of the filing of the libel." Thereupon the following issues were framed for a jury:

"Was the libellee guilty of adultery with one Elizabeth Morse within the years 1867, 1868 and 1869, at Northampton, and while the said Elizabeth Morse was living in the house of the libellee, and in the house of the libellee?

"Was the libellee guilty of grossly, wantonly and cruelly refusing and neglecting to provide suitable maintenance for the libellant, within the period from January 1, 1868, to July 13, 1870, he being of sufficient ability to provide the same."

At the trial, before the jury were empanelled, the libellee moved for an order for a fuller specification under the charge of adultery; but *Colt, J.*, overruled the motion, stating, however, that relief should be afforded to the libellee, if, in the course of the trial, the evidence offered under the specification, as it stood, should appear to be a surprise to him. The libellee also contended that the second issue was improperly framed under the libel; but the judge directed the trial to proceed upon it, and afterwards, during the trial, allowed an amendment of the libel, without terms, so as to allege the neglect to provide suitable maintenance between the dates specified in that issue. The libellee did not ask for any delay by reason of the amendment. The jury returned a verdict against the libellee upon both issues, and he alleged a bill of exceptions, which, after stating the foregoing facts and rulings, and the substance of the evidence introduced on the trial, concluded as follows:

"The defendant and Elizabeth Morse were called as witnesses and testified; and both denied ever having had sexual intercourse with each other. They gave material evidence for the libellee on both issues. The libellant was also a material witness in her own behalf. The counsel for the libellee, in his argument to the jury, claimed that the evidence of the libellee and Elizabeth Morse was to be relied on the same as that of any witnesses having an interest in the issues involved. The judge instructed the jury at some length upon both issues, but without written minutes of his charge; no objection was made or exception taken to his remarks to the jury at the trial, nor was any request made for further or more particular instructions. The attention of the judge was first called to what purported to be a small portion of his charge, some days after the adjournment of the term, when the libellee presented his exceptions in their original draft. But in substance the jury were told, so far as relates to the matters now complained of, that the questions of fact and the credit due to witnesses were solely for them, that the court intended to express no opinion in regard to them and they had no right to infer from anything that might fall from the judge what his own opinion was upon the facts. Upon the charge of adultery, he stated the nature of the fact to be proved, and the kind of evidence by which such a fact is ordinarily established; and then went on to say that this evidence was here met by the denial of the husband and Elizabeth Morse; that parties to the suit as the law now stands have a right to testify, though formerly it was thought unsafe to permit it, and even a pecuniary interest however trifling was formerly sufficient to exclude a man from testifying in his own favor, for fear that in the infirmity of human nature he would not testify to the truth; that this was the law for many ages; that criminals especially were formerly not permitted to testify in their own behalf, because it was said by many that to allow it would be a mere farce; that a man who committed a crime would certainly lie about it, and a man charged with adultery would swear he was not guilty, tempted both to shield himself and by a false sentiment of honor to screen the other party to the crime. That a woman who was so depraved as to commit adultery would

have no other course but to come forward and deny it, for to stay away would be confession. That such testimony was to be received with care, in view of these suggestions. As the law now stands, both parties have now a right to testify, and the jury must receive and examine their testimony and give it such weight as in their opinion it ought to have. If satisfied that they tell the truth, or if upon all the evidence they are not reasonably satisfied that the burden which is upon the libellant to prove her case is removed, they must bring in a verdict of not guilty on this issue. To the rulings and instructions above stated the libellee excepted."

*W. Allen & D. W. Bond*, for the libellee.

*C. Delano*, (*J. C. Hammond* with him,) for the libellant, was stopped by the court on the points relating to the specifications and the amendment.

MORTON, J. The statute provides that "the courts shall not charge juries with respect to matters of fact, but may state the testimony and the law." Gen. Sts. c. 115, § 5.

In *Commonwealth v. Barry*, 9 Allen, 276, the court held, after careful consideration of the construction of this statute, that it prohibited the judge from expressing his opinion as to the credibility of the witnesses examined in the case. In the opinion of the court, Chief Justice Bigelow says: "The prohibition must be regarded as a restraint only on the expression of an opinion by the court on the question whether a particular fact or series of facts involved in the issue of a case is or is not established by the evidence. In other words, it is to be construed so as to prevent courts from interfering with the province of juries by any statement of their own judgment or conclusion upon matters of fact. This construction effectually accomplishes the great object of guarding against any bias or undue influence which might be created in the minds of jurors, if the weight of the opinion of the court should be permitted to be thrown into the scale, in deciding upon issues of fact. But further than this the legislature did not intend to go. The statute was not designed to deprive the court of all power to deal with the facts proved. On the contrary, the last clause of the section very clearly contemplates that the duty

of the court may not be fully discharged by a mere statement of the law. By providing that the court may also state the testimony, the manifest purpose of the legislature was to recognize and affirm the power and authority of the court, to be exercised according to its discretion, to sum up the evidence, to state its legal effect and bearing on the issues, and to indicate its proper application under the rules of law."

In *Commonwealth v. Larrabee*, 99 Mass. 413, it was held that this statute, while it restrains the judge from expressing an opinion upon the credibility of particular witnesses, does not preclude him from defining the degree of weight which the law attaches to a whole class of testimony, such as the testimony of accomplices, leaving it to the jury to apply the general rule to the circumstances of the case. Similar principles are held in *Durant v. Burt*, 98 Mass. 161, and *Oakman v. Boyce*, 100 Mass. 477.

Critically examining the charge in the case at bar, in the light of the principles established by these cases, we are unable to see that it is open to the objection that the court charged in respect to matters of fact. The report of the charge, in the bill of exceptions, is manifestly defective, especially in the punctuation. But there is no difficulty in ascertaining from the context what the meaning of the presiding judge was. If we were to adopt the views of the libellee's counsel, and construe the charge as stating, as a rule of law, that a person charged with adultery would swear he was not guilty, it would be liable to exception. But such clearly was not the meaning of the judge. He was stating the reasons used against the admissibility of two classes of testimony, namely, that of parties to the suit, and that of persons accused of crime; and was not laying down a rule of law or indicating his own opinion. The manifest design and effect were, to call the attention of the jury to the peculiar circumstances under which these two classes of witnesses always testified, leaving them to apply the general rule to the case before them. The suggestions as to the testimony of parties to the suit applied as strongly to the libellant as to the libellee. It was the duty of the jury to keep constantly in their minds the peculiar circumstances under which witnesses of these classes always testified.

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Unless they did so, they could not intelligently weigh the testimony in the case. We do not think that the judge exceeded his duty, in calling their attention to these considerations, and instructing them that the testimony should be weighed with care, in view of these suggestions. He intimated no opinion as to the credibility of any of the witnesses in this case. On the contrary, he expressly cautioned the jury, that the questions of fact and the credit due to witnesses were solely for them; that the court intended to express no opinion in regard to them; and that they had no right to infer, from anything which might fall from the judge, what his own opinion was upon the facts. We do not think that this was a charge in respect to matters of fact, within the statute.

The other exceptions taken at the trial cannot be sustained. The refusal of the court to order further specifications is not the subject of exceptions. In all cases, civil and criminal, the question whether bills of particulars or specifications shall be ordered is within the discretion of the presiding judge. *Commonwealth v. Giles*, 1 Gray, 466. *Commonwealth v. Wood*, 4 Gray, 11. *Gardner v. Gardner*, 2 Gray, 434.

The allowance of the amendment, without terms, was also a matter within the discretion of the presiding judge. The fourth rule of the court for the regulation of practice at common law does not apply to a suit for a divorce.

*Exceptions overruled.*

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LEROY S. LEWIS *vs.* GEORGE I. SMITH.

In an action against a ferryman, on his contract for the transportation of animals which fell off the ferry boat and were drowned, through his alleged carelessness in not furnishing the boat with a barrier where they fell, evidence is inadmissible that just such a boat had been used to transport animals over the ferry daily for thirty years, and no accident had ever occurred before.

In an action of contract against a common carrier for a failure to perform his ordinary undertaking of transportation, the burden is on him to prove that he failed to perform it from a cause which relieved him from liability.

In an action against a ferryman, on his contract for the transportation of a team of mules which fell off the ferry boat and were drowned, through his alleged carelessness in not

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furnishing the boat with a barrier where they fell, a refusal of a ruling that, if the loss was occasioned wholly by the fault of the mules, the defendant was not liable, affords him no ground of exception, if the only sense in which the ruling was applicable to the evidence was, that the defendant was not liable if the mules started back and forced themselves into the water without any known or apparent cause.

**CONTRACT.** The declaration alleged "that the defendant was the licensed proprietor, manager and conductor of a ferry boat, plying across the Connecticut River between the bank of said river in Northampton and the opposite bank in South Hadley, at a place commonly known as Smith's Ferry; that the defendant, as such proprietor, manager and conductor of said ferry boat, and as a common carrier of passengers and teams on said boat across said river, for a compensation agreed to be paid by the plaintiff to the defendant, undertook to carry safely and securely across said river the plaintiff's team, consisting of two mules, a wagon, and the harnesses by which the mules were attached thereto; but that the defendant neglected and refused to furnish a suitable and sufficient boat, and suitable and sufficient guards, chains and barriers on said boat, for the security of the plaintiff's team, composed as aforesaid, and by his unskilful management of said boat, and for want of proper guards, chains and barriers, the plaintiff's team was precipitated off said boat into said river, and said mules were drowned and said wagon and harnesses rendered valueless." The answer denied each and every allegation of the plaintiff, and alleged "that, if the plaintiff suffered any loss or damage, he suffered it from his own carelessness and fault, and not from any fault or negligence of the defendant." Trial and verdict for the plaintiff in the superior court, before *Lord, J.*, who made the following report thereof:

"No question was made as to the facts that the defendant was a ferryman and received the mules on board his boat for transportation on July 5, 1870, and that they were drowned, having backed off the end of the boat into the river, while crossing. The mules were on the way from Hartford to Northampton, under care of the plaintiff's servants, who called for ferriage of themselves and team across the river. It was also agreed between the parties, that there was no chain across the end of the boat, nor other barrier; that no obstruction was put behind the wheels,

nor any other precaution taken to prevent the wheels from moving, either by chaining, blocking or otherwise ; and that the defendant had no one on board to assist him, and could not leave his position. The evidence as to the character of the mules was contradictory, the plaintiff claiming that they were gentle and docile ; the defendant, that they were ugly and unmanageable. There was contradictory evidence as to the condition of the servants having the mules in charge. The plaintiff claimed that they were sober and capable ; the defendant, that they were under the influence of liquor, and the driver especially not able to walk steadily, but that he fell or stumbled against the mules, causing them to start and back off the boat. The evidence was contradictory as to what took place when the mules came on board. The defendant claimed that he requested the plaintiff's servants to unharness them ; the plaintiff claimed that no such request was made.

" The defendant offered to prove that, for thirty years previously, such a boat as this had been in use at this ferry, transporting some twenty teams a day, and that no accident had ever before happened. I deemed this evidence immaterial, and so ruled.

" In charging the jury, I instructed them that in an action of contract against a common carrier of goods, for not delivering them according to his undertaking, it was enough in the first place for the plaintiff to show that his goods were received to be carried, and that they were not delivered according to the agreement ; that then it was incumbent upon the defendant to avoid his liability, and he could do so only by proving one of two things, either, first, that he was prevented from performing his undertaking by act of God, or second, by the public enemy ; that the liability of a common carrier of passengers was of the same nature, but the carrier could avoid his liability by showing other facts than those necessary to exonerate a carrier of goods, which it was not necessary to state ; that a ferryman was also a common carrier, but his liability might be avoided in manner different from either the simple carrier of goods or the carrier of passengers, but that his liability was of the same general nature, that is, that, if it be shown that he undertook to transport the mules across

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the ferry and did not do it, but they were lost to the plaintiff while crossing, he must avoid his liability by showing that their loss was occasioned by some cause for which he was not responsible; that if he requested the plaintiff's servants to unharness the mules for their security, and they refused, he would not be liable; that if such servants were under the influence of liquor, and stumbled against the mules, and thus started them off, he would not be liable; but I charged that in all cases of common carriers (whether of goods or passengers) or ferrymen, in an action of assumpsit, where the plaintiff has proved the defendant's undertaking and his failure to perform, the burden is upon the defendant to show that his failure was for some cause which in law relieves him from liability. No objection was made to the part of the charge which stated the difference of liability in carriers (of goods or passengers) and ferrymen; but the defendant claimed that the burden of proof was upon the plaintiff to show that the loss was occasioned by some want of care on the part of the defendant.

"I was requested to rule that if the loss was occasioned wholly by the fault of the mules, the defendant was not liable. I declined to give this instruction, because I deemed it liable to misunderstanding, and because I did not deem it applicable to the facts proved, in every sense in which the words might be used. The only sense in which the instruction asked for was applicable to the facts was this: if the mules, without any known or apparent cause, of their own motion, started back and forced the carriage and themselves into the river, and were drowned, the defendant was not liable. As this was the only sense in which the language used could be applicable to the facts, and as in my opinion such a condition of facts would not exonerate the defendant from liability, I declined to give the instruction.

"Upon the three questions raised: first, whether my ruling was correct, that it was immaterial whether such a boat had run thirty years without accident; second, whether in an action of contract for not performing the undertaking of a common carrier the burden is upon the defendant to show that the non-performance was for a cause which relieved him from liability; and third,



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whether I was bound to give the instruction as asked in relation to the loss happening by the sole fault of the mules ; I report the case for the determination of the supreme judicial court."

*G. M. Stearns*, for the defendant.

*C. Delano & J. C. Hammond*, for the plaintiff.

CHAPMAN, C. J. This is an action for breach of a contract of the defendant, who was a licensed ferryman, to transport a pair of mules across the Connecticut River on his boat. The case is reported upon three questions that were raised at the trial.

1. The judge excluded evidence, offered by the defendant, that for thirty years previously to the accident in question such a boat as this had been in use at this ferry, transporting some twenty teams a day, and no accident had ever before happened ; and it was excluded as immaterial. It is apparent that the question in issue in this case was whether the defendant had on this occasion performed his contract, it being admitted that he made it and received the mules on board for transportation. The evidence offered was plainly not pertinent to the issue, but related to collateral matters. *Collins v. Dorchester*, 6 Cush. 396. *Aldrich v. Pelham*, 1 Gray, 510. *Kidder v. Dunstable*, 11 Gray, 342.

2. The ruling that, in an action of contract for not performing the undertaking of a common carrier, the burden of proof is upon the defendant to show that the non-performance was for a cause which relieved him from liability, is sustained by the authorities. *Hastings v. Pepper*, 11 Pick. 41. *Ware v. Gay*, Ib. 106. 1 Greenl. Ev. § 222. Story on Bailments, § 529. Angell on Carriers, § 472, and cases cited.

3. The defendant requested the judge to instruct the jury that the defendant was not liable if the loss was occasioned wholly by the fault of the mules. This was refused, because the judge thought it liable to misunderstanding, and not applicable to the facts proved. The report tends to show that the view of the judge was correct, for it appeared that the mules were drowned by backing off the end of the boat, and there was no chain or other barrier across the end.

*Judgment on the verdict.*

FRANCIS A. LYMAN *vs.* INHABITANTS OF AMHERST.

In an action against a town for an injury received by a traveller through a defect in a highway, the fact that, knowing of the defective place, he voluntarily attempted to pass it, is not conclusive of a want of due care on his part, but only a circumstance for the jury in determining that question.

On the trial of an action against a town for an injury received by a traveller whose horse slipped in a highway and was drawn backwards over a bank by the weight of the wagon, whereby he was thrown out and injured, if the judge requires the jury to find that the want of a sufficient railing along the bank was the sole cause of the injury, in order to return a verdict for the plaintiff, the defendants have no ground of exception to his refusal of rulings as to whether the highway was defective from the nature of its material at the place where the horse slipped.

A railing by the side of a highway is sufficient within the Gen. Sts. c. 44, § 22, if it is suitable for the ordinary exigencies of travel upon such a road at such a place.

In an action against a town, on the Gen. Sts. c. 44, § 22, by a traveller whose horse and wagon with its load, weighing together about thirty-two hundred pounds, fell off the highway through the insufficiency of a railing by the side of it to resist their weight falling upon it from some height, the question whether the railing should have been of sufficient strength for that purpose is for the jury upon all the circumstances of the case.

TORT on the Gen. Sts. c. 44, § 22, for injuries alleged to have been received by the plaintiff through a defect in a highway leading from Amherst to Granby, which the defendants were bound to keep in repair, and on which he was travelling with due care at the time of his injury. The answer admitted the obligation of the defendants to keep the highway in repair, and denied all the other allegations of the plaintiff.

At the trial in the superior court, before *Pitman, J.*, the plaintiff introduced evidence tending to show that he was a peddler of tin ware, and on the afternoon of September 15, 1869, had gathered a load of old iron and rags, weighing about 1250 pounds, in barter for his ware; that he loaded a wagon (which he described in his testimony as a "one horse lumber wagon") with the iron and rags, at a place in South Amherst, and between ten and eleven o'clock at night started (with his son, who was seven years old) to drive to Springfield by moonlight, and in his route had occasion to travel on the highway in question, which led across what was called a mountain; that he was acquainted with the road, and had travelled over it several times, and twice since the previous March; that the horse was a kind and well broken ani-

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mal, which he had driven during the whole summer ; that the road up the mountain was crossed by water-bars, at which he stopped the horse several times, and just before eleven o'clock, on the ascent, the horse, after passing a water-bar, slackened its pace, and the plaintiff stopped it, with the wagon half way over the bar ; that, when he started the horse, it strained to advance, but apparently lost footing by stepping on something in the road, and fell on its knees ; that, on being started again, it fell on its knees a second time, and the loaded wagon dragged it backwards and sidelong, and off a bank into a ravine, at a place, fifteen feet below the water-bar, where there was no fence by the side of the road, except some rails on the boundary of the adjoining lot, below the bank, which were placed there to prevent cattle from entering on the highway, and which the wagon broke through ; that the horse, while dragged backwards, exerted itself to resist and to pull forwards, but never regained control of the load after the backward motion began ; that what it stepped upon, at or about the time it lost footing, was a stone, partly imbedded in the road and somewhat smaller than a man's fist ; that in the fall of the horse and wagon off the bank the plaintiff was thrown to a distance of thirty feet from the wagon, and seriously injured ; that the whole weight of the horse, wagon and load was about 3200 pounds, the slope of the road up the mountain was about fifteen feet in the hundred, and the width of the road from twelve to fifteen feet ; that the road was built of the soil on which it was located, (which consisted of loam and gravel mixed with small stones,) and was level, and somewhat soft, one witness testifying that "the extent of the softness is, that a loaded wagon with wheels of two inches tire in breadth would sink in from half an inch to an inch ;" and that the railing, at the place where the wagon broke through it, was about even with the top of the bank in height, and was "not very good," and the selectmen of the town had been notified, five years before, that the place was dangerous, but neglected to repair it. The plaintiff testified that it was only "an instant" between the time when the horse last fell on its knees, and the time when the wagon fell over the bank.

The defendants did not dispute that the railing was "insufficient to prevent teams from going off, that might come upon it in the manner in which this did;" but contended that certain evidence, which they introduced, tended to show that, "in conjunction with the trees there standing, it was sufficient to protect the public travelling along in the usual and ordinary manner."

The plaintiff contended that the highway was defective, not only for the insufficiency of the railing at the place where the wagon broke through it, but also for insufficiency of the road-bed, by reason of the light and loose materials of which it was composed at the place where the horse lost footing.

The defendants prayed for the following instructions to the jury:

"1. If the plaintiff was well acquainted with this road, and knew its steepness and its dangers, and knowing and understanding these undertook in the night time to pass over the mountain by this road with a heavy load, he undertook it at his peril, was not in the exercise of due care, and cannot recover.

"2. A stone of the size described by the witnesses and partially imbedded in the road-bed would not be a defect in a road of the character of this road, where the accident occurred.

"3. If the road in this case was of the soil where it was located, was substantially level and flat from side to side, from twelve to fifteen feet wide, but the soil was gravel, with small stones intermingled, not larger than a walnut, and was so soft that a loaded team-wagon of two inches tire would sink in from a half to one inch, the road would not be defective on that account.

"4. There is no evidence in the case that the road-bed was defective.

"5. If the jury shall find that the road-bed was not defective, there is no evidence in the case to warrant a verdict for the plaintiff.

"6. If the plaintiff's horse from any cause became uncontrollable, and the driver could not guide or direct him, and in such condition backed or was dragged down the mountain a considerable distance to the place of the accident, and was then precipi

tated over the side of the road and down a bank, and the driver at no time was able to regain control of the horse, the plaintiff cannot recover.

"7. If the load was so great that the horse could not draw the same, and in attempting so to do was dragged, in spite of all his efforts, to the place of accident, and down the bank at the side of the road, the plaintiff cannot recover.

"8. If any viciousness of the horse contributed to the injury, the plaintiff cannot recover.

"9. If a reasonable railing would not have prevented the accident, its absence is no ground of recovery by the plaintiff.

"10. The defendants were not bound to provide a railing at this place, of such strength as would resist and stay a team, loaded as this was, violently precipitated upon it backwards from some considerable distance above.

"11. If the only defect was the want of a sufficient railing at the place of accident, then under the circumstances of this case the plaintiff cannot recover.

"12. The evidence in this case shows that the plaintiff did lose the control of his horse and did not regain it before the accident, and that the loss of control was more than momentary or temporary.

"13. There is no evidence in this case upon which the plaintiff can recover."

The judge adopted and gave the eighth and ninth instructions thus prayed for; but refused to adopt the others in terms, or except as follows:

"In connection with the first prayer he said to the jury that they might consider all the elements set forth in the prayer, so far as proved, in determining whether the plaintiff was in the exercise of ordinary care.

"As to the second prayer, he instructed them that the mere existence of a single stone so imbedded as stated in the prayer would not of itself authorize a jury to find the road defective, but that he did not feel bound to withdraw any piece of evidence concerning the condition of the road-bed from the consideration of the jury, in determining whether upon the whole case it was or not reasonably safe and convenient.

"As to the tenth prayer, he ruled that the town was bound only to provide a railing suitable for the ordinary exigencies of travel upon such a road at such a place."

Then, after general instructions "that the plaintiff must prove that there was a defect in the road which had existed over twenty-four hours or of which the defendants had reasonable notice, that this defect was the sole cause of the accident, that the plaintiff was at the time using the road as a traveller with a suitable and manageable team, and that he was in the exercise of due care and skill in all respects," he further instructed the jury upon points raised by the defendant's prayers, as follows: "If the plaintiff was travelling in the exercise of ordinary care, diligence and skill in reference to his horse, harness, carriage and load, and in his use of the road, and if the road-bed was insecure, defective and not in suitable repair at the place where the horse lost his foothold, and if in consequence of this, and without any fault or vice on the part of the horse or any want of care or skill in the driver, the horse was overcome by the load, (the load also being a suitable one,) and precipitated down the bank for want of a suitable railing, then the defendants are liable."

"The judge also read to the jury the ruling of Mr. Justice Foster as reported in *Babson v. Rockport*, 101 Mass. 93, 97; and stated that this had been upheld by the supreme judicial court; that, applying the general doctrine there laid down to the case at bar, if the plaintiff was travelling as aforesaid, and if the horse, from stepping on a stone, or from the nature of the road-bed, whether it was in law defective or otherwise, was overcome in his forward motion, and drawn backwards by the load, and if the horse was, without any viciousness or fault, endeavoring and exerting himself to regain his footing and to hold the road, and the plaintiff was also doing all that was practicable in regard to the team, until the wagon reached the point where the alleged defect by want of railing existed, and the jury are satisfied that the horse and wagon did not practically and substantially pass beyond the control of the plaintiff except momentarily, and that the plaintiff would have regained control immediately if there had been no defect by reason of want of suitable railing, and the

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plaintiff has proved the other essentials for the maintenance of his action, then the defendants are liable."

The jury found for the plaintiff with damages in the sum of \$4000, and the defendants alleged exceptions.

*G. M. Stearns*, for the defendants. The first ruling asked for should have been given; for if the plaintiff not only previously knew of the dangers of the road, as in *Whittaker v. West Boylston*, 97 Mass. 273, and cases there cited, but at the very time of passing over the alleged defective portion of it knew and understood the danger he was encountering, and voluntarily undertook the passage, he cannot recover. *Horton v. Ipswich*, 12 Cush. 488. *Wilson v. Charlestown*, 8 Allen, 137.

The third and fourth should also have been given. The third was in substantial accordance with the evidence, and was a proper question of law. The court should have given instructions as to what would constitute a defect. *Macomber v. Taunton*, 100 Mass. 255. *Billings v. Worcester*, 102 Mass. 329. This road was a mountain road between two small towns. It was impracticable to transport other soil there as the natural soil washed away. Towns are held only to make their roads reasonably safe considering all circumstances. *Stanton v. Springfield*, 12 Allen, 566. *Nason v. Boston*, 14 Allen, 508. 100 Mass. 255. 102 Mass. 329.

By the fifth prayer, the defendants asked for a ruling that if the horse, without their fault, lost ability to draw or hold the load, and involuntarily and helplessly was drawn backward down the hill, as described in the evidence, then they were not liable because there was an insufficient railing. The evidence shows that the horse was wholly beyond control of the driver, and wholly unable to control the load; that there was not a momentary loss of control which would have been at once regained, but a total and substantial loss of control. There was no evidence upon which it was proper to submit to the jury the question which was submitted by the final instruction given by the court. The burden being upon the plaintiff to show that his loss of control was only momentary, and there being no evidence to show that condition of things, the plaintiff cannot recover, if the road-bed was not defective. *Titus v. Northbridge*, 97 Mass. 258. *Fogg*

v. *Nahant*, 98 Mass. 578. *Stone v. Hubbardston*, 100 Mass. 49. *Babson v. Rockport*, 101 Mass. 93.

The sixth prayer was in accordance with the instructions of Mr. Justice Foster in *Babson v. Rockport*, which have been declared by this court to be accurate.

The court refused the seventh prayer, but gave no distinct and independent instructions as to what would be the legal result if the horse was overcome by reason of being too heavily loaded. The plaintiff was not entitled to recover, if the horse was drawn backward by too heavy a load, and the overloading thus contributed to the accident.

The tenth prayer especially should have been granted. As matter of law, towns are not bound to provide railings against such occurrences as this one. There was no dispute as to what was its character and violence, and it was not proper to submit to the jury whether or not it was an ordinary exigency of travel. And the eleventh prayer also should have been granted; because an ordinary railing would not have resisted such a load and such violence, the town was not called upon to provide a railing against such accidents, and if there was no other defect than want of railing the horse must have been drawn down the hill by some fault of the plaintiff.

As to the twelfth prayer, the court should not have left it to the jury to determine the questions stated therein. There was no conflicting testimony upon it. And on the whole case the defendants were entitled to a verdict by direction of the court, as requested in their thirteenth prayer.

*C. Delano*, for the plaintiff.

MORTON, J. The court is of opinion that the instructions given at the trial were sufficiently favorable to the defendants. The evidence tended to show that, while the plaintiff was traveling over a steep road in Amherst, his horse, either by stepping on a rolling stone, or because of the soft and yielding character of the road-bed, for a moment lost the control of his load, and was drawn backward, by its weight, over the banks of the road. The alleged defect was the want of a suitable railing at the place where he went over. Under the instructions, the jury were re-



quired to find that the plaintiff had a manageable horse, without any fault or vice which contributed to the accident ; that the load was suitable ; that the horse was not at any time beyond the control of the driver, except momentarily ; that the plaintiff was in all other respects in the exercise of due care ; that the road was defective for want of a suitable railing ; and that such defect had existed for more than twenty-four hours, and was the sole cause of the injury. Upon these facts it is clear that the town is liable. *Babson v. Rockport*, 101 Mass. 93.

The defendants presented thirteen prayers for instructions. The presiding judge adopted the second, eighth and ninth, and refused the others. We think such refusal was right.

1. The fact that the plaintiff was acquainted with the road does not necessarily prevent his recovering, and the court properly left this fact, in connection with the other evidence, to the jury, to be by them considered upon the question of due care on the part of the plaintiff. *Frost v. Waltham*, 12 Allen, 85.

2. The third, fourth and fifth prayers relate solely to the question whether the road-bed was defective. We do not see that this question was material. Whether the road-bed was defective or not, the town would be liable upon the other facts which the jury were required to find under the instructions. *Babson v. Rockport*, 101 Mass. 93.

3. The instructions given upon the subject embraced in the sixth prayer were in conformity with the decision in *Babson v. Rockport*.

4. The instructions given required the jury to find that the load was a suitable one, and thus adopted, in substance, the seventh prayer.

5. In answer to the tenth prayer, the court correctly stated the rule to be, that "the town was bound only to provide a railing suitable for the ordinary exigencies of travel upon such a road at such a place." Whether such a railing would resist and stay a team loaded as this was, was a question of fact for the jury.

6. The proposition stated in the eleventh prayer cannot be sustained as law. We have already seen that upon the facts of this case, as found by the jury, the town is liable.

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7. The last two prayers involve questions of fact which are for the jury. It was for them to determine whether there was any loss of control of the horse, and if so, whether it was momentary. There was some evidence upon this, and upon all the other issues in the case, which was properly submitted to the jury.

Upon the whole case, we are of opinion that the defendants were not aggrieved by any of the rulings or refusals to rule at the trial.

*Exceptions overruled.*

### WINCHESTER BRITTON vs. INHABITANTS OF CUMMINGTON.

A person journeying on a highway does not necessarily forfeit his rights as a traveller while he stops to pick berries by the wayside.

At the trial of an action against a town on the Gen. Sts. c. 44, § 23, these facts were proved: The plaintiff, while driving on the highway with his wife and four young children, in a two-seated carriage, the fore wheels of which turned under its body, drawn by a pair of large horses, stopped on a level place, where the way ran along a precipitous bank, ten or twelve feet above a river and unguarded by any barrier; alighted; and walked back ten or twelve feet, to pick berries by the wayside; leaving the reins with his oldest son, who was twelve and a half years of age, accustomed to drive, and as competent and skilful as any boy of that age. His wife soon called to him to return, for the head of one of the horses was caught; and stepping to the heads of the horses he found them standing in the same position in which he had left them, but that the check-rein of one was hitched over the blinder of the other. While he was trying to unhitch it, first this horse, and then both horses, backed, so that in not more than a quarter of a minute, and within twelve feet of where he stood, the body of the carriage was swung around and one of the hind wheels went over the bank, he meanwhile endeavoring to pull the horses so as to keep them in the line of the road. *Held*, that, on these facts, the questions (1) whether the plaintiff had ceased to be a traveller at the time of the accident; (2) whether there was due care on his part; (3) whether, if he lost control of the horses, the loss was but momentary; and (4) whether the way was defective for want of a barrier; were all for the jury.

At a new trial, the foregoing facts were varied by evidence that the highway was narrow, and bounded by a high and wooded hill on the side opposite the bank, at the place where the plaintiff stopped; that he stopped in the centre of the road; that the horses, though gentle, were powerful and high spirited, and the boy with whom he left the reins had never driven them alone; that (without any evidence as to the competency and skill of this boy as compared with boys in general) he was physically and mentally the smartest boy the plaintiff had at his age; that when the plaintiff stopped and walked back to pick berries, he observed the river below the bank, but did not observe the precipitous slope of the bank, or observe or think whether there was any railing; that the bank was seven or eight feet high; that when one and before both of the horses began to back he seized the bits with both of his hands; that they did not back more than two or three feet before both hind wheels of the carriage went over the bank; that the carriage then

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drew the horses over by its weight; that until they went over he exerted himself to stop them from backing, and afterwards to keep them at right angles with the carriage so that they should not fall on it; and that, about the time when the carriage struck the water the horses saw the bank and jumped, and he and they went over the bank together. *Held*, that the question whether there was due care on the part of the plaintiff was still for the jury.

TORT on the Gen. Sts. c. 44, § 22, for injuries alleged to have been received by the plaintiff by being hurt in his person and having his horses and carriage injured through a defect in a highway leading from Cummington to Windsor, which the defendants were bound to keep in repair, and on which the plaintiff was travelling with due care. The answer denied all the plaintiff's material allegations.

At the trial in the superior court, before *Pitman, J.*, the defendants admitted that the highway was one which they were bound to keep in repair, and the plaintiff's testimony concerning the accident tended to show that the facts were as follows :

The plaintiff, who was a resident of New York, was journeying with his wife and four young children in a two-seated carriage, called a "rockaway," the fore wheels of which turned under its body, drawn by a pair of horses fully sixteen hands tall, which held their heads high. On August 6, 1870, as he was driving over this highway, seeing some raspberries by the wayside, he stopped to pick them, as he had done on several other occasions during the journey. At the place where he stopped, the highway ran along the bank of a branch of the Westfield River, ten or twelve feet above the stream. He handed the reins to his oldest son (who was twelve and a half years old, accustomed to drive, and as competent and skilful as any boy of that age) and alighted from the carriage, walked back ten or twelve feet, and began to pick the berries. His wife soon called to him to return, for the head of one of the horses was caught; and what then occurred the plaintiff, in his own words, described thus : "I stepped to his head, and tried to take off the check rein of the other horse, which was then over the blinder of this one. The team had not started from the position in which I left them. It was on a dead level. As I sought to free the check rein, the horse raised his head. I was not tall enough to reach. The other

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horse then began to back. I saw the carriage was cramping and likely to go off. The horses continued to back, and I to pull them round. The carriage went slowly over the bank, which was perpendicular. From the time when the horse commenced backing it was not more than a quarter of a minute till the wheel went over. I was endeavoring all the time to keep the horses in the line of the street. My family went over sideways, and the carriage backwards. There was no barrier. The rein was so entangled that it could not be extricated from the carriage. If I had been in there, I should have had to step out and do just as I did." The plaintiff further testified "that from the place where he stood to adjust the rein it was some twelve feet to the place where the hind wheel went off the bank."

The judge, being of opinion that the plaintiff could not maintain his action on these facts, by agreement of the parties withdrew the case from the jury and reported it to this court; if the said facts would not sustain the action, the plaintiff to become nonsuit; otherwise, the case to stand for trial.

*C. Delano, (J. C. Hammond with him,) for the plaintiff.*

*S. T. Spaulding, for the defendants.*

CHAPMAN, C. J. There can be no doubt that a traveller on the highway may stop his horse, alight from his carriage, and employ himself, while out of his carriage, in acts that have no connection with his journey or its purpose. *Babson v. Rockport*, 101 Mass. 93. Such a position and such employment, for a reasonable time, would not of itself deprive him of his rights as a traveller. Rests of such a character, during a journey, are common. They may be of such a character as to make it clear that the party has ceased to use the highway as a traveller, and when there is no evidence that the plaintiff is using it as a traveller, it is the duty of the court to take the case from the jury, as in *Stickney v. Salem*, 3 Allen, 374. So if there is no evidence that the plaintiff used due care, or had the control of his horse, or that the way was out of repair. But it appears to us from the report, that on all these points there was sufficient evidence to go to the jury. There was evidence of care, before the horses began to back; and though the plaintiff appears to have lost control of

his horses, yet it would be competent to the jury to find, upon the circumstances stated, that it was only a momentary loss. There was also evidence that the want of a railing at that place was a defect. It is not necessary to consider whether the circumstances would satisfy the jury. It is only decided that the evidence is not so defective as to justify the court in taking the case from the jury.

*Case to stand for trial.*

The case was tried again, and a verdict returned for the plaintiff with damages in the sum of \$2000, before *Rockwell, J.*, who allowed the following bill of exceptions :

“ As evidence that he was in the exercise of ordinary care at the time of the accident, the plaintiff testified on all points in the case, and among other things that on August 6, 1870, he was going from Goshen to Lanesborough with his family, in a rock-away drawn by a span of horses which were sixteen hands high, heavy and high forward, and held their heads very high ; that he had had the horses fifteen months, and they were perfectly gentle, and though they were spirited any one could drive them with one hand ; that his wife could drive them ; that, by the side of the road where the accident occurred, he saw some very large red raspberries, and got out to pick them ; ” and further as follows : “ I stopped about the centre of the road, handed the reins to my boy, (who had often driven the horses and was physically and mentally the smartest boy I have at his age,) stepped out of the carriage and walked back to where these berries were — about a rod back of where we stopped. At this place, there was a stream on the left hand side and a high hill on the right. The road was level. After I had picked perhaps half a dozen berries, I heard my wife say ‘ Winchester.’ I looked and saw everything was quiet, but, she having called me, I stepped two or three steps, when she said, ‘ Come quick, the horse’s head is caught.’ Then I started to run. I stepped in between the carriage and the stream, and when I arrived there I perceived that the nigh horse had caught in some way his head underneath the check rein of the off horse. These horses were more powerful than beautiful one six and one seven years old, quite high spirited. I do not

think my wife and boy had ever driven them without I or some one was with them. I had a man who used to drive out with the family, and I have seen him let them have the reins, the same as with me. I did not observe the slope of the embankment until afterwards. As I went along, I did not observe whether there was any railing. The raspberries were on the side of the road towards the stream. I took no notice as to a railing on the embankment. I noticed there was a stream below me, but the railing I thought nothing about before the accident. I did not know that the law required any railing. It was a pretty narrow road. The hill at the right, the original timber had been cut off; it was more or less woody, and the road was shaded somewhat by the hill and the shrubbery. I do not think it was warm for the season. The flies did not plague the horses, to attract attention. It is common for flies to plague horses in August. These horses were sensitive to flies, as all horses are."

"The plaintiff further testified, that at the time he reached the horses' heads they had not moved from their position; that, as he reached up to get the check rein off, the nigh horse reared a little, and he could not reach the rein, and from the tightening of the rein or some other cause the off horse then began to back; that he then seized the bits with both hands, and both horses began to back; that the forward wheels turned under the rockaway; that the horses, as he thought, did not back more than two or three feet before the hind wheels of the rockaway were going down the slope towards the stream; that there was a precipitous bank here of some eight or nine feet; that he thought he had stopped the first backing, but after the carriage had got on the slope it was the carriage that drew the horses back, and when he saw that the carriage must go over the bank he exerted himself to keep the horses at right angles with the carriage, so that when they should go off the bank they might not go upon the carriage; that the carriage went over squarely, and struck the bottom of the stream; that, about that time, the horses saw the bank and jumped and 'we all went over together;' and that, had he been in the carriage himself, he must have got out in order to disengage the horse's head, and should have done just as he did do.

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"Full instructions were given, in accordance with the opinion of the supreme judicial court in this case, on the question whether the plaintiff at the time of the accident was a traveller.

"The foregoing evidence of the plaintiff was all the evidence in the case, to show that he was in the exercise of ordinary care. The defendants requested the judge to rule that the plaintiff upon his own testimony was not in the exercise of ordinary care; that upon all the evidence in the case, as matter of law, he was not in the exercise of ordinary care; and that the action could not be maintained. But he refused so to rule, and submitted the question whether the plaintiff was in the exercise of ordinary care, as a question of fact, to the jury."

These exceptions were argued by the same counsel at September term 1872, upon the single question of the sufficiency of the evidence for the jury on the question of the plaintiff's care.

BY THE COURT. There was evidence proper to be submitted to the jury, in the opinion of a majority of this court.

*Exceptions overruled.*



### JOHN H. FOWLE vs. NEW HAVEN AND NORTHAMPTON COMPANY.

A judgment against a railroad corporation for damages not limited to those actually suffered at the date of the writ, for locating and constructing their road on the bank of a river so as to divert its course and cause it to wash away the plaintiff's land, is a bar to a like action by him against them for subsequent damages from the same cause.

TORT. Writ dated February 5, 1870. The declaration alleged that the plaintiff "is the owner of a certain parcel of land situate in Northampton, bounded northerly by lands of the defendants, easterly by Pleasant Street, southerly by lands of the heirs of the late George Cook, and westerly by Mill River; that the said Mill River is a certain ancient stream and watercourse and that the defendants have wrongfully so constructed their road-bed and road along the bank of the said river, and in, over and across the bed of the said river, and have so filled up with

earth, stones and other obstructions the bed and channels of the said river, where the water has from time immemorial been accustomed and ought to flow, that the current of water and the flow thereof has been changed and deflected from its usual and proper course, and directed and driven towards and against the westerly embankment of the plaintiff's above described parcel of land, and thereby undermined the same, and caused the disruption of a large portion of soil and earth therefrom, to wit, thirty thousand cubic feet of the said soil and earth, so that the same, falling into the stream, has been washed away, and the residue of the said parcel, by reason of the premises, has been greatly lessened in value, to the great nuisance of the plaintiff's lands, and to the damage of the said plaintiff," &c. The answer denied that the defendants had wrongfully constructed their road or road-bed to the plaintiff's injury, and as to his other allegations averred ignorance and left him to prove them.

At the trial in the superior court, before *Rockwell, J.*, the plaintiff put in evidence a copy of the record of a former action brought by him against these defendants in the superior court on July 31, 1867, upon a declaration in precisely similar terms, except that the quantity of soil alleged to have been detached and washed away was ten thousand feet, to which they answered admitting his ownership of the land alleged to have been injured, and alleging "that they are a railroad corporation duly authorized by law to construct the railroad mentioned in the declaration, and to take land therefor; that by virtue of said authority they located and constructed their said railroad over land of which the land described in the declaration was parcel; and that, if any damage was done to the plaintiff's said land by the defendants as alleged, it was damage occasioned by laying out, making and maintaining said railroad under the authority aforesaid, for which the plaintiff cannot by law maintain an action of tort against these defendants." And that record showed that at the trial of said action a verdict was returned for the plaintiff with damages in the sum of \$350; that the jury further found that one third of said damages accrued before July 31, 1867; and that judg-



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ment was entered on the verdict on November 7, 1868, and execution thereupon issued on November 14.

The plaintiff also, in connection with that record, offered evidence tending to prove "that for many years before 1865 there had been no injurious wearing away of his land by the river; that during that time he had maintained an abutment on the bank of the river, which had been sufficient to protect his land from injury; that in 1865 the embankment of the defendants' railroad was built just above the bend in the river, and partly in the bed of the stream, whereby the current at high water was so changed and diverted from its former course that the abutment ceased to be any protection, and the current was brought against the plaintiff's land in such a manner as to wash away large quantities of it; that the verdict in the former action was rendered on June 10, 1868; that that action was for damages to the plaintiff's land after the railroad embankment was built; that at the time of the verdict in that action there had been a little over seven surface rods of land carried away; and that a little more than that quantity had been carried away since." And the plaintiff stated that he did not claim in this action damages for injury sustained before the former verdict, nor since the commencement of this action.

The defendants objected, that the plaintiff could not recover for damages sustained since the former action; and that the record of the former action showed that the damages therein recovered were in full of all arising from the same cause. But the judge ruled that this action could nevertheless be maintained; the jury found for the plaintiff; and the defendants alleged exceptions to this ruling. Other exceptions taken by them at the trial are now immaterial.

*W. Allen & D. W. Bond*, for the defendants.

*C. Delano*, (*J. C. Hammond* with him,) for the plaintiff.

GRAY, J. The embankment of the defendants was a permanent structure, which, without any further act except keeping it in repair, must continue to turn the current of the river in such a manner as gradually to wash away the plaintiff's land. For this injury the plaintiff might recover in one action entire damages, not limited to those which had been actually suffered at the

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date of the writ. And the judgment in one such action is a bar to another like action between the parties for subsequent injuries from the same cause. *Troy v. Cheshire Railroad Co.* 3 Foster, 83. *Warner v. Bacon*, 8 Gray, 397, 402, 405.

This case is not like one of illegally flowing land by means of a mill-dam, where the damage is not caused by the mere existence of the dam itself, but by the height at which the water is retained by it, according to the manner of its use from time to time, as in *Staple v. Spring*, 10 Mass. 72, and *Hodges v. Hodges*, 5 Met. 205. Nor is it the case of an action against a grantee who, after notice to remove it, maintains a nuisance erected by his grantor, as in *McDonough v. Gilman*, 8 Allen, 264, and *Nichols v. Boston*, 98 Mass. 39.

The objection that the plaintiff could not recover for damages sustained since bringing his former action was therefore well taken; and as this objection is fatal, it is unnecessary to consider the other exceptions alleged. *Exceptions sustained.*



EDSON F. HANNUM & another, administrators, vs. JOSEPH S. KINGSLEY.

In a deed of land described as "bounded north of A. B.'s land," and west on a certain road, the said word "of" may be construed to mean "by," if necessary to make the whole description coherent.

By a quitclaim deed, J. S. conveyed all his right and title in real estate described as "one piece of land lying the south side of the county road," and definitely bounded; "also all the land situate and lying north of the road aforesaid, bounded north of M.'s land and west on" another road. Construing "of" in the sense of "by," in the phrase "north of M.'s land," the description included one piece of land, divided into two parcels by the county road. *Held*, that it did not also include another piece of land lying north of the county road and of M.'s land, and not bounded west on the other road.

Extrinsic evidence is inadmissible to vary the construction of a deed, as between a third person and the grantee.

WRIT OF ENTRY brought on May 12, 1871, under the Gen. Sts. c. 102, §§ 12, 13, by the administrators of the estate of Waitstill S. Pomeroy, to recover a parcel of land in Northampton. Plea, *nul disseisin*. Trial in the superior court, before

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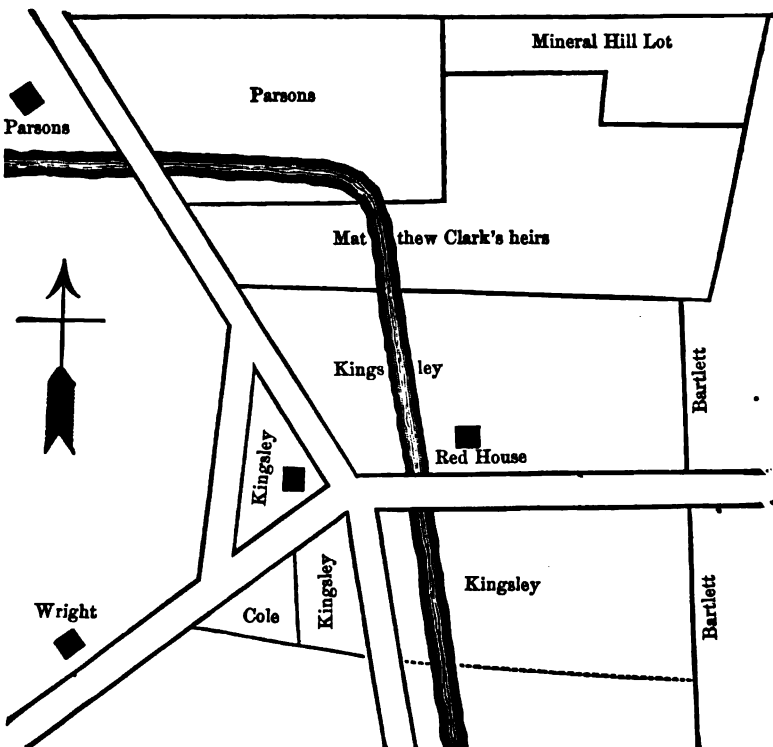
*Pitman*, J., who by consent of the parties made a report under the St. of 1869, c. 438, before verdict, of which the following is the substance :

It was agreed that the demandants were duly licensed to sell the real estate of their intestate ; that after the license was granted, and before this action was brought, Hannum made a formal entry on the demanded premises in behalf of himself and his co-administrator ; and that the premises were owned by Ira B. Thorp, who conveyed them to Zenas Kingsley by deed dated March 12, 1880.

The demandants claimed title under a deed from Zenas Kingsley to their intestate, dated February 24, 1868. The tenant claimed title under a deed to himself from Joseph Kingsley and said Zenas Kingsley, dated February 1, 1838, wherein, for the consideration of \$300, the said Joseph and Zenas quitclaimed and released to the tenant, his heirs and assigns forever, all their right and title in "the following real estate and described property, viz. : one piece of land lying the south side of the county road and east of Harvey Cole's land so far south as said Cole's southeast corner, then running eastwardly across the river to Lyman Bartlett's land so as to contain one half of the lot lying east of the river adjoining the road aforesaid ; also all the land situate and lying north of the road aforesaid, bounded north of the heirs of Matthew Clark's land and west on the road which leads from Asa Parsons's dwelling-house to Martin Wright's dwelling-house, with all the buildings standing thereon, excepting one half of the grist mill and the red house and garden situate east of the bridge for the use of the said Joseph Kingsley during his natural life and no more ; also two thirds of all we own of the saw mill and shingle do., with the banks, dams and yards, with two thirds of all the land adjoining which is deeded to Jos. S. and Z. Kingsley by Martin Wright."

A plan was made part of the report, of which the following is a transcript sufficiently accurate for the purposes of the case. The demanded premises were those designated thereon as the "Mineral Hill lot ;" and the curved line represents the course of the river.

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The demandants denied that the demanded premises were included in the tenant's deed by a true construction of its terms ; and thereupon the tenant offered the following evidence as bearing upon the construction of said deed :

1. " That Zenas Kingsley had no legal interest in any of the land described in the deed, except the demanded premises and an undivided third of seven acres of land adjoining the saw mill mentioned in the deed as deeded to Joseph S. and Zenas."

2. " That the deed was made in carrying out an arrangement for the division of property, real and personal, part of which was undivided property, and part had been held by them in carrying on manufacturing business, and that the deed in question was made in pursuance of a written agreement between the parties, in which the demanded premises are particularly mentioned,

which agreement is also offered in evidence." This agreement was signed and recorded (but not sealed or acknowledged) by Joseph Kingsley, Zenas Kingsley and the tenant, dated February 1, 1838, and entitled an agreement "respecting a settlement and disposition of business and property they have on hand and what they may have hereafter;" and the following are the essential parts thereof: "Joseph S. Kingsley has assigned him for his portion the large building nigh the bridge, the house he now lives in, and the house near the school-house, with all the lands lying north of the county road which leads to Northampton adjoining the heirs of Matthew Clark on the north; also south of the road aforesaid so far as the southeast corner of H. Cole's land, running easterly parallel with said Cole's south line to the river, then still running eastwardly to Lyman Bartlett's land so as to contain one half of the lot lying east of the river adjoining the road aforesaid; also one half of the mountain lot which we had of I. B. Thorp, and two thirds of land adjoining the saw mill, and two thirds of all we own of the saw mill and shingle do., with two thirds of the land belonging to the same." "Zenas Kingsley has assigned him, for his part or portion, the lower factory and all the machinery that belongs to the woollen manufacturing and cloth dressing, the house where he now lives, the lot of land on which the house stands adjoining the road west of H. Cole's land north running east to Lyman Bartlett's land so as to contain one half of the lot east of the river adjoining Zenas Wright's land on the south; one half of the mountain lot; and one third of the lot adjoining the saw mill, and one third part of what we own of the saw mill and shingle do." "Joseph Kingsley has assigned him the house and garden which stands east of the bridge, during his natural life, and one half of the grist mill with the use of one half of the blacksmith shop during his life, then afterwards to be Jos. S. Kingsley's forever."

3. "That, although the title to the premises was in Zenas Kingsley, they were treated as partnership property, and the beneficial interest was in them."

4. "That, in the division of the property of which this land formed a part, no deed was given to Joseph Kingsley by Joseph

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S. and Zenas, or either of them, although title and interest in real estate were retained by him."

If by the true construction of the deed from Joseph Kingsley and Zenas Kingsley to the tenant, in connection with such, if any, portion of the evidence offered by the tenant upon the construction of the deed as was admissible therefor, the tenant had no title, then judgment was to be entered for the demandants; but if the evidence offered by the tenant to affect the construction of the deed was admissible, and might be material, then the case was to stand for trial.

*C. Delano*, for the demandants.

*S. T. Spaulding*, for the tenant. The demanded premises were conveyed to the tenant by the deed of February 1, 1838. "Of" primarily means "proceeding from," and denotes distance. In popular language, a place described as north of a given line or object is understood to be north from that line or object; but not as certainly, or even presumptively, adjacent thereto. Such also is the use of those or similar words in deeds. *Wellfleet v. Truro*, 5 Allen, 137. *Bond v. Fay*, 8 Allen, 212. *Cronin v. Richardson*, 1b. 423. Therefore the words "all the land situate and lying north of the road aforesaid," even if standing alone, would include all the land of the grantors above the road, whether consisting of one or several pieces, and whether next to the road, or at a distance from it, especially as the lot conveyed below or south of the road is described as adjoining it. But further, in this case, the word "bounded," in the phrase "bounded north of the heirs of Matthew Clark's land," is designedly used to fix the north line of Matthew Clark's heirs as the south line of the lot conveyed.

The evidence offered to show what land the grantors had an interest in north of and next to the land of Matthew Clark's heirs, and especially that Zenas Kingsley alone had the legal title, was necessary, to apply the description to the subject matter, The deed being only a release of the right and title of the grantors, subsequent purchasers were put upon inquiry what the interest of both and each was, whether the same or different, and whether an ownership in fee or of any less interest. There is not the same presumption in a deed of release of right and title

only, as in a warranty deed, that the grantor has an interest in every part of the described premises. *Farwell v. Rogers*, 99 Mass. 33. The evidence tended to show that the parties to the deed possessed the parcels of land therein described, including the demanded premises, irrespectively of the legal title, as partnership property, so that, though Joseph Kingsley had no freehold interest in the premises, he had possessory and equitable rights therein. *Pettingill v. Porter*, 3 Allen, 349, 353. And it tended to show that they were distributing several parcels of land, including the demanded premises, as one subject matter.

If, applying the evidence and referring to the plan, it appears that a lot lay north of the road and next to it, and extended west to the road from Parsons's house to Wright's house, and had thereon the buildings mentioned, and it also appears that another lot lay north of and next to the land of Matthew Clark's heirs, but did not extend west to the road, in both of which lots the grantors had an interest, the description should be read as if written "all the land situate and lying north of the road aforesaid, that bounded north of (from) the heirs of Matthew Clark's land, and that bounded west on the road which leads from Asa Parsons's dwelling-house," &c., "with all the buildings standing thereon," &c. "North of the heirs of Matthew Clark's land" calls for land there, and cannot be changed or rejected. *Worthington v. Hylyer*, 4 Mass. 196. Therefore, even if it was the intention to exclude the Mineral Hill lot, such intention cannot be given effect in this action, without undertaking to proceed upon the principle of reforming the language of a deed in a court of law, which has no jurisdiction for that purpose.

The boundary west on the road may be rejected, if impossible. *Thatcher v. Howland*, 2 Met. 41. *Bosworth v. Sturtevant*, 2 Cush. 392. *Parks v. Loomis*, 6 Gray, 467, 472.

The sketchy character of the deed favors the construction which includes the Mineral Hill lot; because it appears, by the plan, that the tenant derives title to four or five separate parcels under one description.

GRAY, J. The deed of February 1, 1838, under which the tenant claims title, first clearly describes all the boundaries of

"one piece of land lying the south side of the county road," on both sides of the river, bounded by Cole's land on the west, by a definite line on the south, and by Bartlett's land on the east. It then adds "all the land situate and lying north of the road aforesaid, bounded north of the heirs of Matthew Clark's land, and west on" another road distinctly identified. Upon applying the deed to the land as shown on the plan, we can have no doubt that, taking the whole deed together, the words "bounded north of the heirs of Matthew Clark's land" define the northern boundary of the premises granted. This is so obviously the only construction which will make the whole description coherent, that we must, if necessary, hold the word "of," in this clause, to have been used in its obsolete, but perfectly grammatical, meaning of "by," as in the familiar examples — "seen of men" — "led of the spirit" — "tempted of the devil." But the more natural inference is, that the scrivener, having just written "situate and lying north of the road aforesaid," and being about to specify what the land granted lay south of, used, as correlative and equivalent to the words "lying south," the words "bounded north," and inadvertently repeated the preposition "of," (which he had already applied to four of the boundaries — "lying the south side of the county road" — "east of Harvey Cole's land" — "lying east of the river" — "situate and lying north of the road aforesaid,") instead of substituting "on," as he did in the next following clause, when he came to describe the western boundary on the other road. Upon the construction for which the tenant contends, this road, which is as distinctly called for as any other monument referred to, would be wholly rejected. We are therefore of opinion that the deed in question included only lands lying compactly together, and not the outlying lot farther to the north, which is separated by the land of Matthew Clark's heirs from the other lands described.

As the legal title in that lot, which is the land demanded in this action, is admitted to have been in Zenas Kingsley, and was not, for the reasons above stated, included in the deed to the tenant, it passed by the subsequent deed to Pomeroy, under whom the demandants claim, unaffected by any notice, actual or con-



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 Clement & Hawkes Manufacturing Company v. Meseroles.
 

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structive, of any of the matters offered in evidence by the tenant. None of those matters are therefore admissible to impeach or defeat the title of the demandants. It may be remarked that the unsealed agreement of February 1, 1838, between the parties to the deed of that date, under which the tenant claims, describes "all the lands lying north of the county road" as "adjoining the heirs of Matthew Clark on the north," and that there is no evidence of the identity of "the mountain lot," therein mentioned, with the demanded premises. *Judgment for the demandants.*

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 CLEMENT & HAWKES MANUFACTURING COMPANY vs. PETER S. MESEROLE.
 

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A dealer ordered two hundred dozen hoes to be manufactured, and delivered to him within a certain time; and the manufacturer accepted the order, with the remark that he would endeavor to fulfil it promptly. The price per dozen was stipulated in the contract; but not the time of payment. A month after the time set for the completion of the delivery, the manufacturer, having then delivered only a hundred and ten dozen, drew on the dealer for part of the price of that quantity. The dealer refused to accept the draft, and directed the manufacturer to send him no more hoes; and then, in an action brought by the manufacturer for the price of those delivered and received, sought to recoup in damages for the delay in fulfilling the order. *Held*, that the manufacturer had a right to regard the direction to send no more hoes as a rescission of the contract as to the ninety dozen undelivered; and that the dealer had no ground of exception to a ruling that the measure of his damages, as to the hundred and ten dozen, was whatever decline in their market value occurred between the time when he was entitled to their delivery and the time when they were actually delivered to him.

CONTRACT, brought on August 4, 1869, for the price of goods sold and delivered by the plaintiffs to the defendant, who sought to recoup in damages for the plaintiffs' failure to deliver the goods within a time specified in his order for them. At the trial in the superior court, before *Rockwell, J.*, the jury returned a verdict for the plaintiffs; and the defendant alleged exceptions. The case is stated in the opinion.

*G. M. Stearns & M. P. Knowlton*, for the defendant.

*C. Delano*, (*J. C. Hammond* with him,) for the plaintiffs.

AMES, J. The correspondence of the parties shows that the defendant was desirous to have the exclusive agency for the sale

of the plaintiffs' weeding-hoes in the states west of Michigan and Ohio. In their reply to his proposition, they say that they are willing to arrange with him upon some such plan, and if he would "make an order of sufficient magnitude to warrant," they would not "canvass in the territory mentioned," but would leave it entirely for him to occupy. He then sends an order for two hundred dozen, of specified sizes and prices, one half to be shipped on or about March 15, 1869, and the remainder on or about April 15. They reply, saying that they will endeavor to furnish the hoes promptly at the times specified. There was therefore an executory contract of sale as to two hundred dozen, which it was understood that the plaintiffs were to manufacture and send forward; but although this contract provides for the price per dozen, and the time of delivery, it contains no stipulation whatever as to the time when payment should be made by the defendant.

We find nothing in the evidence that has any tendency to show that the plaintiffs have broken their engagement not to canvass in the territory which they had agreed to leave for him to occupy. It does not appear that they have established any other agency, or made any other sales, in that region; or have directly or indirectly interfered with the exclusive agency for which he had stipulated. It was no part of their contract that other purchasers in other markets should not send their goods wherever they chose.

The plaintiffs proceeded, in pursuance of the above order, to manufacture the goods, and to forward them to the defendant at various dates from April 5 till May 22, until one hundred and ten dozen in all had been delivered, the delay having been a matter of frequent complaint on one side and explanation on the other. At this stage of the case, the plaintiffs drew an order upon him for a part of the price, which he refused to accept, insisting that he expected and was entitled to a longer credit, and at the same time directing them to send him no more of the goods. It appears to us, that, upon this refusal of payment, and this countermand as to the remaining ninety dozen, the plaintiffs were justified in considering the unexecuted portion of the contract of sale as rescinded. No time of payment having been agreed upon

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in the original contract, they at least had a right to call for payment in a reasonable time, and were under no obligation to give credit indefinitely. The defendant therefore has no ground of complaint as to the ninety dozen so countermanded.

With regard to the one hundred and ten dozen which he received, as the original order allowed some latitude as to the time of shipment, and as the plaintiffs' reply to the order was that they would endeavor to furnish the goods promptly at the time specified, it was properly left to the jury to say whether there had been substantially a compliance with the contract. As we understand the instructions, the jury were told that, if the defendant had sustained any damage by delay in the shipments, he would be entitled to an allowance accordingly, but that the measure of damages to be allowed would be such decline in the market value of the goods as might have occurred between the time at which he was entitled to receive them and the time at which they actually were received. We do not think that in such instructions the defendant has any ground of complaint. See *Cutting v. Grand Trunk Railway Co.* 13 Allen, 381, and cases there cited. Neither do we find in any of the rulings any sufficient reason for disturbing the verdict. *Exceptions overruled.*

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### ZENAS W. BROWN vs. MAYNARD LEACH.

No exception lies to the exclusion of evidence of the quality of part of a lot of goods as a sample of the whole, if it does not appear that the person who selected it was competent to judge of its comparative quality.

Upon a bill of exceptions to a ruling excluding evidence of the quality of part of a lot of goods as a sample of the whole, it is not competent to argue that the evidence was admissible to show the quality of that part in itself.

The testimony of an agent, to the substance of an oral message communicated through him from the principal, is not to be excluded in evidence against the latter, upon his objection on the ground that it is hearsay.

If a seller of goods deceives the buyer as to their quality, the buyer cannot avail himself of the deceit in defence against an action for their price, or in reduction of damages therein, if the quality was open to his own observation and with ordinary diligence and prudence he could have ascertained it.

CONTRACT on an account annexed for the price of 4972 spokes bargained and sold to the defendant, 2406 of them at three and a half cents each, 2165 at five cents each, and 401 large spokes at eight cents each. The defendant denied accepting the spokes, or ever agreeing to accept them ; alleged that they were of no value ; and denied generally all the plaintiff's allegations. Trial and verdict for the plaintiff in the superior court, before *Rockwell, J.*, who allowed the following bill of exceptions :

“ The defendant claimed, and introduced evidence tending to show, that the spokes delivered to him were not the same which he had seen and contracted for, but were of an inferior quality and valueless, and that on that account he declined to accept and receive them ; also that the plaintiff, by the arrangement and disposition of the spokes at the time he showed and contracted to sell them to the defendant, and by false and fraudulent representations regarding them, deceived the defendant in regard to their quality, and that they were of inferior quality and of no value.

“ The plaintiff and his brother James S. Brown testified that the spokes were in a room and piled upon each side ; that the pile on one side had belonged to James ; and that the plaintiff by arrangement with James had procured the spokes of James to put with his own, so as to make up the number which he contracted to furnish the defendant.

“ The defendant introduced evidence from persons who testified that they had examined the whole lot of spokes named in the writ, and that there had been selected between forty and fifty of them, which they thought were a fair sample in quality and appearance of the whole lot. He then called witnesses who had seen and examined this sample lot, and who were experts regarding spokes, and proposed to ask them questions regarding these, both as to their appearance as matter of description, and also as to those qualities of which the witnesses could testify only as experts ; and he offered to show by these witnesses that they were of inferior quality and of little value. But the judge excluded the evidence.

“ James S. Brown was a witness for the plaintiff, and testified that the defendant came to the place where the spokes were

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stored, in the witness's building, and examined them with the witness, and there said that he would give three and a half cents each for some of the spokes, five cents for others, and eight cents for others, and as he was going away told the witness to say to the plaintiff that he (the defendant) had been there and should trade with him for a carriage, if they could agree, in exchange for the spokes.

"The plaintiff, while testifying in the case, was afterward asked by his counsel this question: 'What did your brother tell you that the defendant told him to tell you?' and against the defendant's objection was allowed to answer as follows: 'He said the defendant made him an offer of three and a half cents apiece for my spokes, and had agreed to take his spokes and pay five cents apiece for them, and the large ones at eight cents apiece provided he could make a trade on the carriage.' The spokes above referred to were all included in the lot sued for, and the making of any such contract as the above was denied by the defendant, and one of the important questions of the case; the plaintiff contending that the price of the spokes was to be three and a half cents each for a part, five cents each for another part, and eight cents each for another part; and the defendant contending that the price was to be five cents each, for those spokes which he agreed to take.

"The defendant requested the judge to instruct the jury as follows: 'If the jury believe that the plaintiff employed words or conduct with a design to deceive the defendant as to the quality of the spokes, and the defendant was deceived thereby, it would justify him in refusing to receive the goods upon discovering the deceit; also, if they believe that the spokes were piled in the manner they were by the plaintiff or by his direction, with a view to deceive the defendant as to the quality of the spokes, and the defendant was thereby deceived, he was justified in refusing the property on discovering the fraud.' The judge declined to give the instructions unqualifiedly, but gave them with the qualification that if the deception was one which the defendant could not have discovered at the time, by reasonable effort and care in examining the spokes, so as to constitute a latent defect not dis-

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coverable by reasonable care and examination on the part of the defendant, then it would justify him in refusing to receive the goods.

"To all the above rulings, instructions and refusals to rule, the defendant alleged exceptions."

*G. M. Stearns*, for the defendant. 1. Testimony of witnesses who had seen forty or fifty of the spokes was competent, for it was material to the case to show that those were of inferior quality even if all the rest were good; and it was also competent, in connection with the other testimony, as tending to show that the whole lot was inferior. *Rich v. Jones*, 9 Cush. 329, 337. *Beecher v. Denniston*, 13 Gray, 354. *Hayward v. Draper*, 3 Allen, 551. *Pike v. Fay*, 101 Mass. 184.

2. The plaintiff's testimony of what his brother told him was incompetent, for all the evidence tending to show that the brother was authorized to tell him anything shows that it was only to give another specific message, and the defendant was not bound by any different statement he might make; and besides, the evidence called for and given was hearsay.

3. The qualification given by the judge in his instruction was incorrect. It said, in effect, that actionable deceit can only exist in cases of latent defect.

*S. T. Spaulding*, for the plaintiff.

MORTON, J. We think that the defendant's exceptions must be overruled.

1. The bill of exceptions does not show that the ruling rejecting the testimony of the witnesses, as to the quality of the forty or fifty spokes selected as a sample of the whole lot, was erroneous. The testimony was offered for the purpose of showing that the whole lot was of inferior quality. Before a small portion of the spokes could be used as a sample to characterize the whole lot, it must be made to appear that it was a fair sample. This is a preliminary question, to be decided by the presiding judge. And his decision cannot be revised by this court, unless he reports all the facts upon which it is founded, and it appears clearly to be wrong. *Lake v. Clark*, 97 Mass. 346. *Rich v. Jones*, 9 Cush. 329. It does not appear, in this case, that the persons who selected the

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small lot of spokes, which was claimed to be a sample, were experts or competent to form an opinion as to the comparative quality or value of the lot selected and the remainder of the spokes. The presiding judge had the right to reject the testimony offered, upon the ground that the small lot was not shown to be a fair sample of the whole. The point now argued by the defendant, that the testimony was admissible, because it was competent to show, in diminution of damages, that any one or more of the spokes were of inferior quality though all the rest were good, was not taken at the trial, nor ruled upon, and is not open to him under this bill of exceptions.

2. The defendant made James S. Brown his agent to communicate a message to the plaintiff, and we think that, within the fair meaning of the bill of exceptions, he authorized him to communicate the whole of his offer, as well as that part relating to the exchange of a carriage. The communication made was substantially the same as that authorized, and was therefore admissible. *Camerlin v. Palmer Co.* 10 Allen, 539.

3. The instructions given by the presiding judge were in accordance with the adjudications in this state. If the plaintiff, by words or acts, deceived the defendant as to the quality or value of the goods sold, yet the defendant could not maintain an action of deceit, if the goods were open to his observation, and he could by the use of ordinary diligence and prudence ascertain their quality. He should use reasonable diligence to ascertain their quality, or protect himself by a warranty. The same principle applies, when the purchaser seeks to avail himself of the deceit in defence of a suit for the price of the goods, or in reduction of damages. *Brown v. Castles*, 11 Cush. 848. *Gordon v. Parmelee*, 2 Allen, 212. *Veasey v. Doton*, 3 Allen, 880. *Mooney v. Miller*, 102 Mass. 217. *Exceptions overruled.*

## BRYAN ATWATER vs. MICHAEL CLANCY &amp; another.

If a plaintiff joins a count in tort with a count in contract for the same cause of action, it is discretionary with the court to permit him to go to the jury upon both.

An ordinary bill of the parcels, receipted by the seller of goods, is not such a memorandum of the contract of sale as will bar the buyer from proving by parol evidence a warranty of their quality.

It is competent for a jury to find that a sale of a lot of tobacco was made by sample, on evidence that the seller, in the buyer's presence, drew bunches of the tobacco out of some of the cases and said that he would warrant it to be like them all through, whereas soon the buyer entered into negotiations as to a price and concluded the purchase.

The testimony of experts is competent on the questions, whether it is possible to examine all the layers in a case of old tobacco without injuring the tobacco, what is the proper method of examining such a case to determine the kind and quality of the tobacco, and whether it is a usage of the trade to buy old tobacco by sample.

Evidence of a usage in trade to sell a certain kind of goods by sample is admissible to support testimony that a lot of such goods was sold so.

The testimony of a witness, called as an expert upon the question what is the proper way to examine a case of tobacco, is admissible, that it is "to open the case, get down into it, be sure you have the average of the sweat of it, then draw three or four hands, and ask the man if this is the average of his crop."

On the trial of an action for breach of a warranty of the quality of eight cases of tobacco sold by the defendant to the plaintiff, evidence is competent of a warranty as to seven of them only.

On the trial of an action to recover damages for breach of the defendant's warranty of the quality of goods sold to the plaintiff, if a letter written by the plaintiff, which is put in evidence to show that he made a claim on the defendant for such damages, states a price for which he resold the goods, the defendant is entitled, upon request, to a ruling that the statement is no evidence of their actual value.

CONTRACT, alleging that the defendants sold the plaintiff nine cases of tobacco for \$620.26, and to induce him to buy them warranted the tobacco in eight of the cases to be of a grade known as "wrappers," and of the quality throughout that was indicated by samples which they showed him, but that the tobacco was of an inferior quality, and part of it not wrappers but of an inferior grade known as "fillers" and of little value. A count in tort was added, for the same cause of action, alleging that the defendants induced the plaintiff to buy the nine cases of tobacco for \$620.26 by false representations in the particulars above described. Writ dated March 18, 1869. The answer admitted that the defendants sold the plaintiff nine cases of tobacco for \$620.26, and denied all his other allegations.



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*Atwater v. Clancy.*

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At the trial in the superior court, before *Rockwell, J.*, the plaintiff testified that in June 1868 he went with the defendants to examine their 1864 crop of tobacco in a shed near their house in Hatfield; that they represented to him that they had eight cases of wrappers, and one case of a grade called "binders," of that crop; that they opened the cases of wrappers and drew from two to four "hands" of tobacco out of each case, and some of that drawn was thirty and none less than twenty-four inches long; that he did not draw out any tobacco, but asked them if they would warrant it to be the same all through as what they drew, and they said they would; that he observed nothing to indicate that they did not draw fairly; and that he thereupon bought the whole lot of tobacco at the rate of twenty cents per pound for the eight cases of wrappers and seven cents per pound for the case of binders, amounting to \$620.26, which he paid them, and took a bill, signed by them, in the following form: "Hatfield, June 9, 1868. Bryan Atwater, Bought of Michael & James Clancy, Nine cases of leaf tobacco, (8 cases, net weight 2976 @ 20c. \$595.20; 1 case, net weight 358 @ 7c. \$25.06,) \$620.26. Received payment by check;" that the tobacco was to be carted to the railroad station and forwarded to him to New York; that on its arrival in New York he opened the cases, and found that in the eight cases bought as wrappers there were only 1,219 pounds of wrappers and 1,757 of fillers; that the value of fillers at that time was less than five cents per pound; that he then wrote to the defendants on the subject (but had no copy of his letter) and afterwards wrote to them again, demanding a return of part of the price of the tobacco, and received a reply from Michael Clancy (which was put in evidence) dated October 16, 1868, in these terms: "I received your letter, and I beg leave to state to you that when I sold you my tobacco I considered it a trade. What was before your eyes I should think you could see for yourself. I called it a trade for my part, so I hope you will call around and see the new crop, it is good;" and that, hearing nothing further from the defendants after this correspondence, he went to their place in Hatfield in March 1869, and had a conversation there, in which Michael Clancy admitted that he packed

some fillers at the bottom of two or three of the cases of wrappers.

The plaintiff called several dealers in tobacco as experts, and asked them the following question, which was objected to by the defendant and the objection overruled: "Whether or not there is anything in the condition of an old crop of tobacco, (meaning by an old crop a crop three or four years old,) when purchased in cases, which makes it impracticable for the buyer to examine all the layers of the case?" All of them answered that it would be impossible to make such an examination without injuring the tobacco, except one, who said it would be impracticable without taking off the case; and some of them gave at length the reasons of their opinions.

One of these witnesses, John Smith by name, was asked the following question, which was objected to by the defendant and the objection overruled: "What is the proper way of examining a case of tobacco?" To this Smith answered: "You open the case, and get down into the case, and be sure you have the average of the sweat of the case, then draw three or four hands, and then ask the man if this is the average of his crop." He was also asked, under the objection of the defendants, "whether or not buying by sample is a custom known to the trade;" to which he answered that it was.

When the plaintiff rested his case, the defendants requested the judge to require him to elect upon which count of the declaration he would rest it; but the judge refused to do so, and allowed him to go to the jury upon both counts.

Among the evidence introduced by the defendants, there was testimony tending to show that of the nine cases of their 1864 crop, which the plaintiff bought in June 1868, seven (not eight) cases were wrappers, one was binders, and one fillers, and that no fillers were put into the cases of wrappers; that they first asked the plaintiff twenty cents per pound for the entire lot of tobacco, without distinction of kind, and finally sold it to him for twenty cents per pound for the wrappers and binders, and seven cents per pound for the fillers; that the plaintiff had opportunity to examine the tobacco, and did examine it, as much as he chose.

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that the plaintiff drew some short hands of wrappers out of one of the cases, and spoke of their being short, and the defendants told him that it varied in length ; and that nothing whatever was said about a warranty ; that after the tobacco was sent to New York they heard nothing of it until September 1868, when the plaintiff came to their place again and in conversation with them said it was not what it was represented to be, and that there were some binders at the bottom of two or three of the cases ; that Michael Clancy replied that there were some short wrappers at the bottom of two or three of the cases, which he did not think to mention when they sold the tobacco, but there were no binders in the cases of wrappers, and the sale was a fair sale ; that the next they heard on the subject was by a letter from the plaintiff dated in New York on October 7, 1868, to which their letter of October 16 (which the plaintiff had put in evidence) was a reply ; that they received an answer from the plaintiff under date of October 17 ; and that they heard nothing more on the subject until March 1869, when the plaintiff told them that he should sue them and did so.

The plaintiff's letters of October 7 and October 17 were both put in evidence, and the following is the material part of the letter of October 7 : " I have at last disposed of the tobacco bought of you. It brought \$498. I paid you \$620.26 ; freight, cartage, storage, and insurance could not be less than \$20, besides my own time ; leaving a deficiency of \$157.26 as the direct result of false packing. When I bought the tobacco, you stated it was all wrappers except one case of fillers and one case of binders. But the truth is, that four cases more of it were binders and fillers, which you admitted when I called last upon you that you knew. You are liable to me to that amount, and addition of expenses and trouble. I do not like to be imposed upon in that manner ; we must depend upon the representations of the party we buy of, as it is impossible to see every leaf in the cases ; and when parties pack in tobacco of a kind different from what is represented, to wit, fillers and binders among wrappers, they are liable in heavy damages for obtaining money under false pretences. Let me know by return mail what you propose. If you

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will send me a check for the \$157.26, I will drop it; otherwise I shall see what I can do."

The following is all but the formal parts of his letter of October 17: "Yours of yesterday has arrived. Contents noticed. I wrote you thinking we might settle our affairs without a suit at law; but I see I was mistaken. You must be made to know that no man, unless too stupid to do business, will submit to such an imposition. You will shortly hear from me in another way."

There was no evidence that short wrappers were not worth as much as long ones, if of good quality.

The defendants contended "that, inasmuch as there was a written bill of sale from the defendants to the plaintiff, no warranty could be proved by parol, and further, that no warranty could be implied in the case;" but the judge ruled "that there was nothing in relation to the bill of sale, which would prevent the plaintiff from recovering upon the theory either of an express or an implied warranty."

The defendants also contended that there was no evidence that the sale was by sample; but the judge ruled "that there was evidence tending to show that the sale was by sample, and that, although the evidence about the guaranty was not in the case, the jury might be satisfied that there was a sale by sample, and upon the ground that the remaining part of the tobacco was not equal to the sample, if the jury were satisfied of that, it would be sufficient."

The defendants requested a ruling "that if there was a sale of seven cases of wrappers, and a warranty applicable to them and not to a sale of eight cases of wrappers, then there would be a variance, and the plaintiff could not recover on the first count;" but the judge ruled "that it was not necessary for the plaintiff, under the declaration, to prove the precise fact that there was a defect in eight of the cases in this particular; that if it was proved that seven cases were sold as wrappers, and the eighth case was sold as binders, and the ninth case was sold as fillers, that discrepancy would not affect the right of the plaintiff to recover; that if it was proved that instead of eight cases there was a loss only on seven, that would only affect the amount of

damages ; that there was no such accuracy required in the declaration as to prevent the evidence given from applying to the tobacco as the jury should find it would apply."

The defendants also asked for an instruction to the jury "that, if there was a warranty that the tobacco was wrappers of the substantial quality of the samples, the fact that some of the wrappers were shorter than the hands examined would not be a breach of the warranty, unless the jury should find that they were so small as to be substantially different and less in value than the hands examined ;" and the judge instructed the jury that it was their duty to be satisfied as stated in the request, but added : "The plaintiff claims that the sale was by sample, and claims that the samples exhibited were wrappers, that they were long wrappers, and claims that he has proved that the cases were filled up with short hands, which he says ought not to be described as wrappers. The defendants claim that, if there were short hands in the cases, they were still of so good a quality, so fit for the purposes for which the tobacco was to be used, that they ought to be called wrappers, and were properly called wrappers. The warranty upon which the plaintiff claims is, that of the tobacco, which was exhibited by sample, the remaining part of it was not wrappers as good as the wrappers exhibited. It will be for the jury to say, and it is a question of fact for the jury, whether they were wrappers or not, and if they were, then whether as good as those exhibited." The defendants then requested a further instruction "that, if the tobacco in the cases warranted was all wrappers, there was no evidence upon which the jury could find damages for the plaintiff ;" but the judge declined so to rule, and instructed them "that the plaintiff claimed to recover because the remaining part of the tobacco, the great bulk of it, was not as good as the samples ; that it might be that the jury might not be able to determine from the evidence whether a portion of that was properly called wrappers and a portion not ; but that, if the plaintiff had shown that, by reason of its shortness, of its deficiency in that way, it was not substantially wrappers as good as those exhibited by the samples, it would be sufficient." The counsel for the defendants then "called attention to the request

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which was that there was no evidence in the case that short wrappers were not of the price of long ones ;” but the judge ruled “that this was a question for the jury upon the evidence, and he did not feel called upon to say anything about it.”

Finally the defendants requested a ruling “that the statement in the plaintiff’s letter of October 7, as to what he had sold the tobacco for, was no evidence of the actual value of the tobacco which could be considered by the jury ;” but the judge declined so to rule, and instructed the jury “that the evidence was in, and what its effect should be upon the question of damages was for the jury and not for the court ;” and he said : “It is in the case, and I cannot say what they will do with it. I rule that it is in the case as evidence, and I have nothing to say about it.”

The verdict was for the plaintiff on his first count ; and the defendants alleged exceptions.

*W. Allen & D. W. Bond*, for the defendants.

*C. Delano & J. C. Hammond*, for the plaintiff.

CHAPMAN, C. J. 1. The declaration contains a count in tort and a count in contract, alleging that both are for the same cause of action ; and the defendants, after the plaintiff had rested his case, asked the court to require the plaintiff to elect which of the two counts he would rest his case upon. The court refused to do this, but allowed the plaintiff to go to the jury on both counts. This ruling is excepted to. But the request was addressed to the discretion of the court, and the ruling was not subject to exceptions. *Carlton v. Pierce*, 1 Allen, 26. *Sullivan v. Fitzgerald*, 12 Allen, 482. *Crafts v. Belden*, 99 Mass. 535. In *Mullaly v. Austin*, 97 Mass. 30, the remark contained in the opinion, as to compelling the plaintiff to elect which count he would proceed upon, related to two counts in contract, setting forth contracts inconsistent with each other, and not to a case like this.

2. The defendants further except to the admission of parol evidence to prove a warranty, because a bill of sale was given. The bill given was a mere bill of parcels, and not such a contract as would exclude the parol evidence. *Hazard v. Loring*, 10 Cush. 267. *Boardman v. Spooner*, 13 Allen, 353. *Frost v. Blanchard*, 97 Mass. 155.

8. The defendants further except, because the court declined to instruct the jury that there was no evidence that the sale was by sample. We think there was evidence on this point. Samples of the tobacco were exhibited as such, and the circumstances under which it was done were competent to be submitted to the jury.

4. The questions, whether there is anything in the condition of a case of old tobacco which makes it impossible for a purchaser to examine all the layers without injury; the proper method of examining a case of tobacco; and whether buying by sample is a custom known to the trade; relate to matters which are best known to experts. The fact that it is a custom to buy in that way, though it may not prove that the sale in this case was made in this manner, tends to show that the plaintiff's statement on the subject was not incredible, but might be true. The answer of Smith as to the proper method of examining a case, though it might be, as the defendants contend it is, so absurd as to destroy the force of his testimony, yet was not inadmissible, nor did it render the question inadmissible.

5. There was no variance. It was not necessary for the plaintiff to prove the whole claim alleged in his writ. Evidence to prove a sale of seven cases would be proper under a count alleging the sale of eight cases. So as to the warranty.

6. The instruction given to the jury as to the short wrappers was correct. Under it, the jury would be required to find, in order to sustain the action, that the short wrappers were not substantially as good as those that had been exhibited as samples.

7. But the final exception must be sustained. The plaintiff had written a letter to the defendants, stating his claim against them and the grounds of it. It was dated October 7, 1868. He had notified them to produce it, and as they did not do so he proved its contents by parol. They afterwards put in the original. The plaintiff put in their reply to it. As evidence that he made a claim upon them, and of the time when he made it, his letter was evidence, and also of what the claim was. The defendants asked the court to rule that the statement made in this letter, as to what the plaintiff had sold the tobacco for, was

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no evidence of its actual value, which could be considered by the jury. But he declined so to rule, and said that it was in, and what its effect should be on the question of damages was for the jury and not for the court. He also said it was in the case as evidence, and he had nothing to say about it. We think the defendants were entitled to the ruling thus asked. Though the letter was in, it was not in for the purpose indicated in the request. The plaintiff could not thus prove the value of the property by his own statement.

*Last exception sustained ; the others overruled.*

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LUCIEN B. WILLIAMS vs. ROGER WILLIAMS INSURANCE  
COMPANY.

The liability of a mortgagee as indorser of the mortgage note to an assignee of the mortgage gives him an insurable interest in the mortgaged property. And that interest is sufficiently described by calling him "mortgagee," in a policy of insurance, which provides that if the interest of the assured in the property is any other than entire, unconditional and sole ownership it shall be so expressed, and that his interest, whether as owner, trustee, consignee, factor, agent, mortgagee, lessee or otherwise, shall be truly stated therein.

CONTRACT on a policy of insurance, dated July 5, 1870, by which the defendants insured "Little and Stanton, mortgagees," in consideration of a premium by them paid, \$3500 for one year on certain buildings and fixed machinery, "situate in Huntington, Mass., and known as the C. F. Whitaker & Co.'s Mill," payable in case of loss to the plaintiff, and containing, among others, these provisions : "If the interest of the insured in the property, whether as owner, trustee, consignee, factor, agent, mortgagee, lessee, or otherwise, is not truly stated in this policy, this policy shall be void." "If the interest of the insured in the property be any other than the entire, unconditional and sole ownership of the property for the use and benefit of the insured, or if the building insured stands on leased ground, it must be so represented to the company, and so expressed in the written part of this policy otherwise the policy shall be void."



The case was submitted to the judgment of the superior court, and, on appeal, of this court, upon an agreed statement, the material part of which was as follows: "On May 26, 1868, Clarence F. Whitaker and his partner, being owners of the premises, gave a mortgage thereof to William A. Little and Atherton J. Stanton, partners under the firm of Little & Stanton, to secure six notes made by the mortgagors, of that date, amounting in all to \$4000, payable, with interest annually, in two, three, four, five, six and seven years respectively, after date, to said Little & Stanton or order. On January 31, 1870, Little & Stanton, for the sum of \$4000 received by them from the plaintiff, assigned the mortgage and indorsed the notes to the plaintiff. None of the notes have yet been paid. They and the mortgage are still held by the plaintiff. Little & Stanton have become absolutely liable to pay those notes which have matured; the same having been duly at maturity presented for payment, and payment thereof demanded and refused, and notice of such presentment, demand and refusal, and that the holder would look to them for payment, having been duly sent to Little & Stanton. On the notes not yet matured their liability is the ordinary liability of indorsers on notes not yet due. The buildings on the premises mortgaged and described in the policy were destroyed by accidental fire in August 1870, of which due notice and proofs were given to the defendants. The loss, if the plaintiff is entitled to recover anything, was total. The premises, apart from the buildings destroyed by the fire, were and are insufficient in value to satisfy the mortgage debt. The mortgagors were at the time of the fire and ever since have been insolvent."

A. L. Soule, for the plaintiff.

G. M. Stearns, for the defendants.

GRAY, J. It is admitted that Little and Stanton are the assured in this policy, and that the plaintiff is only the person to whom any sum recoverable under it is to be paid. *Loring v. Manufacturers' Insurance Co.* 8 Gray, 28. *Bates v. Equitable Insurance Co.* 10 Wallace, 33. Upon the facts agreed by the parties, two questions have been argued, 1st. Whether Little and Stanton had an insurable interest; 2d. Whether, if they had that interest is well described in the policy.

1. In the present state of the law, there can be no doubt that, at the time of procuring this policy, Little and Stanton, although they had no legal title in the property, had an equitable right and an insurable interest therein. The mortgage stood as security for the payment of the mortgage notes, and the assured, having themselves indorsed those notes at the time of assigning the mortgage, would be entitled in equity, upon being charged on those notes and paying the amount thereof, to have the mortgage reassigned to them, to secure reimbursement from the original makers of the notes and mortgage. *Eastman v. Foster*, 8 Met. 19. *Bryant v. Damon*, 6 Gray, 564. *Rice v. Dewey*, 13 Gray, 47. *New Bedford Institution for Savings v. Fairhaven Bank*, 9 Allen, 175. *Matthews v. Aikin*, 1 Comst. 595. In *Gordon v. Massachusetts Insurance Co.* 2 Pick. 249, one who had made an absolute bill of sale of a vessel, and taken back an agreement in writing from the purchasers to apply the proceeds of the vessel to the payment of certain notes and obligations due from him and indorsed by them, was held to have retained an insurable interest in the vessel. In *Strong v. Manufacturers' Insurance Co.* 10 Pick. 40, it was held that a mortgagor of real estate, whose equity of redemption had been seized and sold on execution, had still, so long as the time of redeeming from such sale had not expired, an insurable interest in the premises. And it is now well established that even one who has no title, legal or equitable, in the property, and no present possession or right of possession thereof, yet has an insurable interest therein, if he will derive benefit from its continuing to exist, or will suffer loss by its destruction. *Putnam v. Mercantile Insurance Co.* 5 Met. 386. *Eastern Railroad Co. v. Relief Insurance Co.* 98 Mass. 420, 423, and other cases there cited. *Springfield Insurance Co. v. Brown*, 43 N. Y. 389.

2. We are also of opinion that the interest of the assured was sufficiently described in the policy. In the absence of any specific inquiry by the insurers, or express stipulation in the policy, no particular description of the nature of the insurable interest would have been necessary. *Strong v. Manufacturers' Insurance Co.* 10 Pick. 40. *King v. State Insurance Co.* 7 Cush. 1, 13. *Springfield Insurance Co. v. Brown*, 43 N. Y. 389. By a familiar

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rule of construction, the provisions requiring a statement of the nature of the interest of the assured, being inserted by the insurers for their own benefit, are to be strictly construed against them. The second of the provisions relied on merely required that, if the interest of the assured was any other than the entire, unconditional and sole ownership of the property for the use and benefit of the assured, it should be so represented and expressed; and the description of the assured in the policy as "mortgagees" clearly represented and expressed that they had not such entire, unconditional and sole ownership. The first provision required that the interest of the assured in the property, whether as owner, trustee, consignee, factor, agent, mortgagee, lessee or otherwise, should be truly stated in the policy, and the statement that they were mortgagees truly stated to which of these classes their interest belonged. This provision does not call for a distinction between legal and equitable title, but only for a true statement of the nature of the insurable interest; and that interest was the same, whether the title of the assured was legal or equitable. *Swift v. Vermont Insurance Co.* 18 Verm. 305. *Hough v. City Insurance Co.* 29 Conn. 10. *Gaylord v. Lamar Insurance Co.* 40 Missouri, 13. The description therefore satisfied the terms of both of the provisions of the policy.

*Judgment for the plaintiff.*

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LEWIS L. DRAPER vs. JOHN HALLORAN.

At the trial of an action brought by an indorsee against the maker on a promissory note, the plaintiff, to prove that the note was signed with the defendant's name by his authority, introduced evidence tending to show that it was made for the indorser's accommodation; that afterwards, in proceedings in bankruptcy against the indorser, the defendant testified that he was liable with him on a promissory note to the plaintiff, and produced a mortgage from the bankrupt, running to the defendant and two others, as security for this and other liabilities; that the validity of the mortgage was contested by the assignee in bankruptcy; and that, in a compromise between the assignee and the defendant, the note in suit was included as the one referred to in the defendant's testimony. Held, that it was incompetent for the defendant thereupon to prove that, in a subsequent release of the mortgage for a consideration less than the sum which it purported to secure, he permitted the other mortgagees to receive the whole consideration, because he did not consider himself liable on the note.

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CONTRACT on a promissory note for \$134, payable to the order of Patrick Halloran, and by him indorsed to the plaintiff. Trial and verdict for the defendant in the superior court before *Rockwell, J.*, to whose rulings the plaintiff alleged exceptions, the material part of which is stated in the opinion.

*S. T. Spaulding*, for the defendant.

*W. Allen*, for the plaintiff.

GRAY, J. This is an action by indorsee against maker on a promissory note. The defendant denied his signature. The indorser testified that the defendant's name was signed to the note by the defendant's authority; that it was given in renewal of a like note signed by the defendant himself; and that both notes were made for the accommodation of the indorser. The plaintiff also offered evidence tending to show that he took the note in suit in good faith, believing it to be signed by the defendant personally; that the indorser afterwards became bankrupt, and his estate was assigned under the bankrupt law of the United States; that the defendant declared to the assignee in bankruptcy that he had a claim against the bankrupt's estate on a note for about \$130 held by the plaintiff, and, on being examined on oath in the proceedings in bankruptcy, stated that he was liable with the bankrupt on a note to the plaintiff; that the defendant made claims against the bankrupt's estate, amounting to \$1500, as security for all which he claimed to hold a mortgage of real estate from the bankrupt, the validity of which was contested by the assignee; that the defendant subsequently, with knowledge that the earlier note had been renewed, made a compromise with the assignee, in which the note in suit was included as one upon which the defendant was liable; and that there was no other note upon which the defendant was liable to the plaintiff except this and the other one already mentioned. The defendant gave in evidence the mortgage, which was to himself and two others, and purported to secure the payment of \$3000.

The defendant was then allowed, against the plaintiff's objection and exception, to put in evidence a subsequent release of the mortgage by himself and the other mortgagees, and to testify that he never received anything on the note or the mortgage, that

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the mortgagees received about \$450 in all, and that he permitted the other mortgagees to have his part because he did not consider himself liable on the note in suit. And his counsel, in the argument to the jury, used this evidence as proof that the defendant at the time of the release believed that he was not liable on the note. This evidence was clearly incompetent. It consisted of subsequent declarations of the defendant in his own favor, and transactions to which the plaintiff was not a party, which had no legal tendency to explain or contradict the evidence afforded by his previous declarations and acts that he considered himself liable to the plaintiff upon the note in suit.

*Exceptions sustained.*

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JOSEPH C. ORCUTT vs. CHARLES F. SYMONDS.

A buyer of intoxicating liquors sold in violation of law may maintain an action on the Gen. Sts. c. 86, § 61, to recover back his payment for them, although he bought for the purpose of selling them again illegally.

A buyer of intoxicating liquors sold in violation of law, who gives his promissory notes for their price, and afterwards pays part of the notes to a bank where the seller procured a discount of them with his own indorsement, and the rest to the seller himself, may recover from the seller, in an action on the Gen. Sts. c. 86, § 61, the amount actually received by him upon the notes both from the bank and from the plaintiff.

CONTRACT on the Gen. Sts. c. 86, § 61, for money had and received to the plaintiff's use. Answer, a general denial, and that, if the plaintiff bought intoxicating liquors of the defendant and paid for them, he did so in this Commonwealth for the purpose of selling them here again in violation of law, and executed that purpose.

At the trial in the superior court, before *Pitman, J.*, the plaintiff testified to the following facts: The defendant kept a tavern in Northampton, with a bar room, in which he sold intoxicating liquors. On September 23, 1870, the plaintiff bought of him, for \$8000, the furniture, fixtures and stores of the tavern, with the intention of keeping it himself. Among the stores so bought were intoxicating liquors to the amount of \$1560.62, for which (apart from the rest of the \$8000) the plaintiff gave his four promissory notes to the defendant on that day, payable at vari-

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ous times, the last in four months. The plaintiff bought the liquors with the intention of retailing them at the bar of the tavern, in the usual course of business of a bar room ; this intention of the plaintiff was mutually understood by the parties at the time of the purchase ; and the plaintiff took possession of them at that time, and did so sell them afterwards. The defendant procured a discount of two of the notes at a bank in Northampton ; and the plaintiff paid all four notes at their maturity, those two to the bank, the other two to the defendant personally.

The defendant requested a ruling that on these facts the action could not be maintained, because of the intention and acts of the plaintiff in the transaction ; but the judge ruled otherwise. The defendant also requested a ruling that the plaintiff could not recover in this form of action any amount he paid upon his promissory notes, and that the statute does not apply to cases of payment for intoxicating liquors by promissory notes. But the judge refused so to rule, and instructed the jury "that, so far as the defendant in fact received money of the plaintiff on account of illegal sales of intoxicating liquors, he is liable in this action, and if he in the first instance received notes for the price, and the amount of some of the notes was paid to the defendant personally, and others were indorsed by the defendant to the bank and discounted, and the proceeds received by the defendant, the plaintiff paying the bank at maturity, it may be considered and treated, so far as the amount actually received by the defendant, as in substance and effect a payment by the plaintiff to the defendant," and "that the measure of damages would be the amount received by the defendant upon the notes." The jury found for the plaintiff accordingly ; and the defendant alleged exceptions.

*G. M. Stearns, (C. Delano with him,)* for the defendant.

1. The Gen. Sts. c. 86, § 61, do not expressly provide that money paid to the seller of intoxicating liquors by the buyer may be recovered back. The right of recovery results from the principles of common law applied to the declaration of the statute that it is received without consideration and against law, equity and good conscience. *Adams v. Goodnow*, 101 Mass. 81. The buyer is put in position to recover, nothing further appearing than the

ordinary facts of a purchase and payment. The statute goes no further, for otherwise the buyer could reclaim the money, even if it was a part of the contract that he should use the liquor to burn buildings or kill persons. In all cases thus far decided under this statute, "the illegality of the transaction, of which the plaintiff offers evidence, is wholly on the part of the defendant, and he himself is not *particeps criminis*." *Walan v. Kerby*, 99 Mass. 1, 2. And in ordinary cases the buyer does not participate in any criminal purpose of the seller, and only buys that he may obtain the article sold. But "if the plaintiff's demand arises *ex turpi causa*, or is founded on an illegal act, the court will not lend its aid in support of the action." *Fairbanks v. Blackington*, 9 Pick. 98, 36. *Worcester v. Eaton*, 11 Mass. 368, 378. Money lost at gaming cannot be recovered back at common law. *Babcock v. Thompson*, 3 Pick. 446. *Plummer v. Gray*, 8 Gray, 243. And money so lost, especially if lost by foul play, as in *Babcock v. Thompson*, would seem to be held by the winner without consideration and against law, equity and good conscience. Nor can money lent for gaming purposes be recovered. *White v. Buss*, 3 Cush. 448. The cases are numerous in which the law will not lend its aid to either party who seeks to enforce a claim arising out of his illegal or immoral acts or contracts. See, besides cases cited above, *Ball v. Gilbert*, 12 Met. 397; *Gregg v. Wyman*, 4 Cush. 322; *Webster v. Munger*, 8 Gray, 584; *Bligh v. James*, 6 Allen, 570. The purpose for which the liquors were bought in the case at bar appeared precisely as the purpose for which the money was lent in *White v. Buss*.

2. The plaintiff's right is only to recover back the actual payment which he made for the liquors. He paid in notes and not in money; and he should have brought his action to recover back the notes, or have defended against them. They cannot be said to represent a money payment for the liquors. If that were so, a man might deliver his notes in payment for liquors and sue to recover back the amount of them, and then defend against them under the statute. In all cases in which it has been held that the defendant could be sued for money had and received, by reason of having received a promissory note, the right of recovery

has been based upon the fact that the note was a valid note, and the defendant had received "money's worth." *Floyd v. Day*, 3 Mass. 403. *Hemmenway v. Bradford*, 14 Mass. 121. *Payson v. Whitcomb*, 15 Pick. 212, 216. *Fairbanks v. Blackington*, 9 Pick. 93. But giving a note not binding on the maker is not payment. *Perkins v. Cummings*, 2 Gray, 258. *Stevens v. Lincoln*, 7 Met. 525.

8. The plaintiff paid the notes voluntarily and gratuitously, knowing that they were void, and acquired thereby no right to recover back his money. *Preston v. Boston*, 12 Pick. 7. *Boston & Sandwich Glass Co. v. Boston*, 4 Met. 181. *Forbes v. Appleton*, 5 Cush. 115. The statute makes notes void which are given for the price of liquors sold in violation of law, but gives no right to recover back payments made upon such notes.

*I. S. Morse & W. Allen*, for the plaintiff.

AMES, J. The purchaser of intoxicating liquors sold in violation of law is not *in pari delicto* with the seller. The money paid by the purchaser to the seller is declared by the statute to be held as received without consideration and against law, equity and good conscience. Gen. Sts. c. 86, § 61. It remained therefore the property of the purchaser, and might be recovered back as such. *Walan v. Kerby*, 99 Mass. 1. *Adams v. Goodnow*, 101 Mass. 81.

It makes no difference that the plaintiff gave his promissory notes for the price. When he paid these notes, he paid the price of the intoxicating liquors, partly to the defendant personally, and partly on his account and in such a manner that the defendant had the benefit of the payment. It does not change the true character of the transaction, that the defendant, by discounting some of the notes at a bank, was able to anticipate their payment. When they matured and were paid, he was relieved of his contingent liability as indorser, and the payment operated to his benefit. The ruling therefore that, to the extent of the amount actually received by the defendant, such payment should be considered as "in substance and effect" a payment by the plaintiff to the defendant, was correct.

*Exceptions overruled.*



**COMMONWEALTH vs. CERTAIN INTOXICATING LIQUORS, Nahum  
H. Tuttle & another, claimants.**

The provision of the St. of 1869, c. 415, § 56, that the notice in a proceeding for the forfeiture of intoxicating liquors valued at more than twenty dollars shall be made returnable to the term of the superior court to be held in the county next after the expiration of fourteen days from the time of issuing it, refers only to terms at which criminal business may be transacted.

A complaint under the St. of 1869, c. 415, § 44, for a warrant to search a vehicle for intoxicating liquors, need not specify the kind of vehicle, if it identifies it otherwise; and if an unintelligible description of the kind of the vehicle is added, it may be rejected as surplusage.

Intoxicating liquors intended to be sold in violation of the St. of 1869, c. 415, by a person to whom they are in course of transportation with reasonable cause on the part of the carrier to believe that such is his intention, are liable to be seized and forfeited under that statute.

A complaint under the St. of 1869, c. 415, § 44, for a warrant to search a vehicle for intoxicating liquors which have already been seized in it under § 57 without a warrant, relates back to the time of the seizure, and is not vitiated by describing the liquors as still in the possession of the person by whom they were kept in the vehicle at that time.

In a proceeding under the St. of 1869, c. 415, for the forfeiture of intoxicating liquors seized in the possession of a carrier who was transporting them to a person by whom they were intended for illegal sale, evidence of declarations of the carrier is admissible to prove that he had reasonable cause to believe that such was the intention.

In a proceeding for forfeiture of intoxicating liquors under the St. of 1869, c. 415, evidence that the claimant keeps a saloon is competent upon the question whether he intended the liquors for illegal sale.

In a proceeding under the St. of 1869, c. 415, for forfeiture of intoxicating liquors seized, in the course of their transportation by a carrier, upon allegations that the person to whom he was carrying them intended them for illegal sale, and that he had reasonable cause to believe that such was the intention, a finding that he had such cause of belief is necessary to a judgment of forfeiture.

On the trial of an issue whether A. intended intoxicating liquors for illegal sale, which were seized by an officer, at a freight depot, in a wagon with which B. was just carrying them away, there was evidence that, immediately after the seizure, A. was present, when B., in driving off with the wagon and liquors, reached the junction of a lane, which led from the depot, with a street where A. kept a saloon; that B. stopped there, and hesitated to go in a direction in which he was ordered to go by the officer, who was also present; and that A. thereupon told B. to drive on. *Held*, that exceptions could not be sustained to a refusal of the presiding judge to rule that there was no evidence for the jury.

**COMPLAINT** under the St. of 1869, c. 415, to a trial justice within and for this county, on September 13, 1869, that certain intoxicating liquors, (particularly described,) on September 11, 1869, "were, and still are, kept and deposited by Ansel Smith of Northampton in said county and the Commonwealth of Massa-

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chusetts, in a certain vehicle, to wit, a certain two hors wags, driven by said Ansel Smith, in said Northampton in said county, said liquor kept, deposited and being conveyed as aforesaid to another person other than the said Ansel Smith, to wit, one Patrick Maloney, said Patrick Maloney intending to sell said liquor in violat'on of the " St. of 1869, c. 415, " and said 'liquor has been sold in said Commonwealth in violation of said chapter, and the said Ansel Smith then and there having reasonable cause to believe that the said liquor has been so illegally sold, and is so intended for illegal sale as aforesaid, in said Commonwealth, against the peace of the Commonwealth and the form of the statute in such case made and provided ; " and praying " for a warrant to search said vehicle, described as aforesaid, for said liquor, and that the same may be declared to be forfeited, and that said Ansel Smith, and all other persons claiming an interest in said liquor, may be summoned to appear before said trial justice, or some other trial justice or court having jurisdiction of the case, to show cause, if any they have, why said liquor should not be declared forfeited."

Upon this complaint, a warrant was issued, on the same day, reciting in the same terms the allegations of the complaint, (save that the words " two horse wagon " were substituted for the words " two hors wags,") and directing the officers to whom it was addressed " forthwith to enter the vehicle herein above described, in the day or night time, and make diligent and careful search for all the liquor herein above described, and, if such liquor is found therein, to seize and convey the same, and the vessels which contain such liquor, to some place of safety, and safely keep the same to await the final action and decision of the court upon said complaint," and summon the complainants as witnesses.

The warrant was executed on that day, by a deputy of the constable of the Commonwealth, who made return thereon, the same day, that by virtue of it he had " searched the within described vehicle, and seized therein, and conveyed to a place of safety, the liquors described in the within warrant, with the vessels in which they are contained, to wit, about ninety-two gallons of whiskey in two casks, and about two hundred and thirteen gallons of gir

in five casks," and had summoned the complainants to appear as witnesses ; and upon the return of the warrant, the trial justice, still on said September 13, being of opinion that the value of the seized liquors and vessels exceeded twenty dollars, ordered notice, under § 48, to Ansel Smith, and all other persons claiming any interest in them, "to appear before the justices of the superior court for the transaction of criminal business, next to be holden at Northampton within and for said county of Hampshire, on the third Monday of December next, to answer to said complaint, and show cause, if any they have, why such liquors, with the vessels containing them, should not be forfeited."

The notice, thereupon served and published under § 56, was dated September 13, 1869, stated that the liquors and vessels were seized in the vehicle of said Ansel Smith on that day by virtue of "a warrant" issued by the trial justice, and required said Ansel Smith and any and all other persons claiming any interest in them "to appear before the justices of the superior court next to be holden at Northampton, in said county of Hampshire, on the third Monday of December next, to answer to the complaint against said liquors and vessels containing them, and for trial, and to show cause, if any you have, why said liquors and vessels should not be forfeited for being conveyed for sale by said Ansel Smith in violation of the laws of this Commonwealth ;" without setting forth more fully the allegations of the complaint and warrant.

At December term 1869 of the superior court, Nahum H. Tuttle and George W. M. Reed, both of New Haven in the state of Connecticut, as claimants of the liquors, entered a special appearance and filed a motion to dismiss the action, alleging "that the court ought not to entertain jurisdiction of said complaint and proceeding, for that the statute directs that whenever the value of the liquor and vessels exceeds twenty dollars the notice to be issued and served shall be made returnable to the 'term of the superior court to be held in the county next after the expiration of fourteen days from the time of issuing the notice,' and the aforesaid claimants show and aver that this is not the then next term, but that this action was justly cognizable at the October term of this court and at no other." The motion was overruled

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by *Pitman*, J., whereupon the claimants entered a general appearance and objected that the complaint "was informal and insufficient, in this, that there was no proper description of the vehicle in which said liquors were kept and deposited; and that the term 'two hors wags' is insensible and unintelligible as a description of said vehicle." But the judge ruled "that it was immaterial what was the meaning of the words designated; that they might be rejected as surplusage; and that it was sufficient to allege that the liquors were kept and deposited in a certain vehicle, without further description of the nature of the vehicle." The claimants then further objected that the complaint, warrant and notices, and all proceedings under them, were irregular and void, because the notice "as published and served did not truly and properly set forth the time of seizure, or the violation of law for which the liquors were seized;" and this objection also was overruled.

The case was then tried to the jury "on an issue directed by the court." The Commonwealth called Eli P. Nichols, a deputy of the constable of the Commonwealth, as a witness, who testified that he went to the Canal Railroad station in Northampton, between eleven and twelve o'clock on the night of Saturday, September 11, 1869, and found several persons there apparently engaged in removing liquor from the cars with two wagons; that it was so dark that he could not distinguish who they were, except Ansel Smith, "who was the driver of a two horse wagon, with the seven casks loaded thereon, which were the same liquors now in controversy;" that he "halted" Smith, who was driving the wagon; and that he saw Patrick Maloney not more than a rod from where he stopped Smith, but did not observe Maloney do anything or say anything in relation to the liquor. The attorney for the Commonwealth asked the witness if Smith told him, at the time he was thus stopped, where he was going with the liquor and what was to be done with it. The claimants objected to the question; but the judge ruled "that Smith's declarations were admissible, not as tending to charge Maloney with any violation or intended violation of the law, but to show Smith's connection with the keeping and transportation of the liquors;" and

the witness testified, under objection, that Smith told him that he was hauling the liquor for Patrick Maloney. This witness was also allowed to testify, under objection, that Maloney kept a saloon in Northampton.

The witnesses for the Commonwealth testified that on Saturday, September 11, 1869, before midnight, "the liquor was conveyed by said constable, and deposited for safe keeping, to the jail, and left in charge of the sheriff till Monday, when some time in the day the complaint was made and the warrant issued." At the close of the evidence for the Commonwealth, the claimants objected that there was a variance between the testimony and the allegations, as to the time of the illegal keeping and transportation.

The verdict was in these words: "The jury find that the liquor described in the complaint was at the time and by the person alleged therein kept for the purpose of being sold in violation of law." To this verdict the claimants objected, "as not covering any proper issue in the case," and moved "that judgment be arrested thereon, and that said verdict be set aside;" but the judge ruled "that said verdict was regular, formal and sufficient, and that judgment should be entered thereon," and ordered judgment accordingly, and the claimants alleged exceptions.

*C. Delano*, for the claimants. 1. A magistrate has no jurisdiction to receive a complaint, or issue a warrant, for the purpose of seizing liquors kept or deposited in a vehicle or other place by a person who has no intent to sell them and is merely transporting them to another person who is known to have such an intent. St. 1869, c. 415, §§ 44, 46, 51, 57. The statute is to be construed strictly. There is nothing in it to show that this extraordinary power of search and seizure is to run against mere carriers. It clearly does not reach a carrier of liquors already sold. See § 37; *Kennedy v. Favor*, 14 Gray, 200, 202; *Kent v. Willey*, 11 Gray, 368.

2. This complaint contains no such formal, particular and sufficient designation of the "building, structure or place" to be searched, as is required by § 46; and the warrant cannot remedy defects in the complaint.

3. All the proceedings in the case are irregular and void, because there was no proper notice duly served and published, truly

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setting forth the time of seizure and the violation of law for which the liquors were seized. They were in fact seized on Saturday, September 11, in the vehicle, and were kept in the jail till Monday, September 13, when the complaint was first made and the warrant issued. The officer's return on the warrant, and the notices issued by the trial justice, all falsify the time of seizure. The complaint should have set out the original seizure without warrant on the 11th; the detention two days to procure a warrant; and then the seizure on the warrant, not as an original seizure, but according to the facts. The allegation that the liquors were on the 11th of September, and "still are" on the 13th, kept and deposited in a "vehicle," was not according to the fact or the proof.

4. On an issue between the Commonwealth and the claimants, the declarations of Ansel Smith were inadmissible for the Commonwealth.

5. The evidence that Maloney kept a saloon was immaterial and incompetent.

6. The verdict covers no proper issue. It finds, if anything, that on the 11th and thence to the 13th of September the liquor was kept by Ansel Smith, for the purpose of being sold by him in violation of law, when there is no allegation that Smith intended to sell the liquor. *Commonwealth v. Intoxicating Liquors*, 4 Allen, 601.

*C. Allen*, Attorney General, for the Commonwealth.

CHAPMAN, C. J. The magistrate properly made his proceedings returnable to the criminal term of the superior court to be held in December, instead of the civil term to be held in October; for civil business only can be done at the civil term, and criminal business at the criminal term.

The complaint contains a sufficient description of the vehicle in which the liquors were kept, without the words which are said to be insensible and unintelligible, and these words were properly rejected as surplusage.

The allegation of the intent to sell conforms to the provisions of the St. of 1869, c. 415. The seizure, the complaint and the warrant were under §§ 37, 44, 57. The criminal intent of the person who has the liquor in the vehicle arises from his having

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reasonable cause to believe that it is intended for sale in violation of the act. The proceeding is *in rem*, the liquor being regarded by the statute, under these circumstances, as a nuisance. It may be seized and taken into custody, but a complaint must then be made, and when made it relates to the time when the seizure was made and not to a subsequent period when the officer has the liquor in custody.\*

If the person having it in the vehicle has reasonable cause to believe that the person to whom he is carrying the liquor intends

\* A similar decision upon this point was made at November term 1871 in Essex, in the case of

COMMONWEALTH vs. CERTAIN INTOXICATING LIQUORS, Hugh Owen,  
claimant.

COMPLAINT under the St. of 1869, c. 415, to a trial justice in Essex, on September 10, 1869, for a warrant to search "a certain vehicle, to wit, a certain wagon, driven by said Owen," for intoxicating liquors which it alleged were on September 9, 1869, "and still are" kept and deposited by him therein, "said liquor kept, deposited and being conveyed to another person other than the said Owen, whose name to the said complainants is now unknown, and said unknown person intending to sell said liquor in violation of" the St. of 1869, c. 415, "and the said Owen then and there having reasonable cause to believe that the said liquor" "is so intended for illegal sale," &c. The warrant issued thereon conformed to these allegations.

After the decision reported in 105 Mass. 468, the case was tried in the superior court before Scudder, J., who made a report thereof, which referred to the complaint and warrant and continued as follows: "At the hearing of the question whether the liquors should be forfeited, it appeared, among other things, that the vehicle and liquors described in the complaint had been seized by one of the complainants (an officer) the day before the complaint was made, without a warrant; and that they were still in his custody, and not in that of said Owen, when said complaint was made and sworn to, and when said warrant was issued. Thereupon the defendant objected that the proceedings could not be maintained; but I overruled this objection and instructed the jury that the variance was not material. A verdict having been rendered for the Commonwealth, I report the case for the determination of the supreme judicial court."

W. D. Northend, for the claimant.

C. Allen, Attorney General, for the Commonwealth.

BY THE COURT. The question raised has been settled in the case in Hampshire of *Commonwealth v. Intoxicating Liquors, Tuttle & another, claimants*. The statute regards the liquors as a nuisance, and the complaint relates to the time of seizure and not to the time when the officer has them in custody.

*Judgment on the verdict.*

to sell it illegally, he is aiding and abetting him in making it subject to seizure. The allegation of intent in the complaint is in conformity with this view.

His declarations as to what he is doing with the liquors, and how he intends to dispose of them, are admissible, being evidence against him. It was also pertinent to prove that Maloney, to whom he was carrying the liquors, kept a saloon, for it tended to prove the purpose for which he was procuring the liquors.

It is objected that the verdict finds no proper issue, and that judgment should not be rendered thereon. The judgment is not to be against Smith or Maloney, but against the liquor and casks. The verdict therefore ought to relate to the condition of the liquor, in respect to its being a nuisance. It should also follow the complaint, which is, that the liquor was kept by Smith in a vehicle, and was being conveyed to Maloney, who intended to sell it in violation of law, Smith having reasonable cause to believe, &c. The defect in this verdict is, that it does not find that Smith had the reasonable cause alleged for believing the intent of Maloney. This is a material fact, and should have been found.

*Exceptions as to the verdict sustained; and the other exceptions overruled.*

Before the jury were empanelled for the new trial, the claimant moved that the proceedings be quashed for want of jurisdiction, "because the process of seizure would not lie against a carrier transporting liquor to a person other than himself, and intended for illegal sale by that other person;" and the motion was overruled.

At the trial, before *Dewey, J.*, Nichols was called again as a witness for the Commonwealth, and testified that about half past eleven o'clock on the night of Saturday, September 11, 1869, he went, with assistants, to the freight depot of the railroad station in Northampton, "and found Ansel Smith just driving away with a load of the liquor in controversy, and required him to stop, and asked him where he was going; that the load was made up of seven barrels of liquor; and that another wagon was at the depot,



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being loaded, but at the approach of the witness and before he could reach the second wagon the liquor was rolled from it back into the car."

In the course of this testimony, Nichols was asked by the attorney for the Commonwealth what Smith replied when the witness asked him where he was going with the liquor; the claimants objected to the admission of Smith's declarations for any other purpose than to show his own violation of the law; and the answer of the witness, that Smith replied "that he was going to Patrick Maloney's," was admitted only for that purpose. It also appeared that Smith made a similar statement to Ignatius L. Randall, another witness for the Commonwealth.

"Nichols also testified that, as Smith was driving out of a narrow lane which leads from the railroad station into Main Street, he stopped and hesitated to go on in the direction in which he was told to go by the constables; and that near the wagon at this point he saw Maloney in company with three or four others, but could only distinguish Maloney, and could not say whether he stopped or not, and did not hear him say anything. Randall, who was also accompanying the team, testified that he saw Maloney and the others, but could only recognize Maloney; that Maloney said 'Drive on;' and that that was all he heard him say.

"Nichols and Randall both testified that Maloney at the time of this seizure kept a saloon on Main Street in Northampton, and had been keeping such saloon; and that he had since added a grocery; but there was no testimony that he kept intoxicating liquors in said saloon."

The testimony as to the disposition made of the liquors after their seizure, and as to all the subsequent proceedings, was the same in substance as on the former trial.

The claimants, after the evidence was all in, requested the judge to rule that there was not sufficient evidence to show that the liquor was intended for sale by Patrick Maloney; but he refused so to rule.

Upon proper issues framed for the jury, they returned the following verdict: "The jury find that the liquors described in the complaint were by Ansel Smith kept as alleged therein and in-

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tended for sale by Patrick Maloney, in violation of the provisions of the four hundred and fifteenth chapter of the statutes of this Commonwealth for the year eighteen hundred and sixty-nine, and that Ansel Smith had reasonable cause to believe that Patrick Maloney intended to sell the same in violation of the provisions of said statutes." The claimants alleged exceptions, which were argued at September term 1872.

*Delano*, for the claimants, upon the point of want of jurisdiction, repeated his former argument on that question; and argued further as follows: There was no sufficient evidence of an intent on the part of Maloney illegally to sell the liquors, and the judge should have ruled so. Smith's statements were hearsay so far as Maloney was concerned, and were properly rejected on the question of Maloney's intent to sell. The only other evidence came from Nichols and Randall. They saw Maloney on the street, and one of them heard him say "Drive on;" and they both testified that he kept a saloon, but there was no evidence that he kept intoxicating liquors in his saloon. The question then is, whether, assuming, as the law presumes, that Maloney was walking the streets as an innocent man, it is enough to overcome that presumption, that one witness heard him say "Drive on," the only other fact being that he kept a saloon; or, in other words, if a saloon-keeper says "Drive on," to a truckman who has liquor on his cart, is it either a conclusion of law or presumption of fact that the saloon-keeper intends illegally to sell that liquor. *Commonwealth v. Packard*, 5 Gray, 101. *Chase v. Breed*, Ib. 440. *Commonwealth v. Snow*, 14 Gray, 385. *Commonwealth v. Merrill*, Ib. 415. *Cochrane v. Boston*, 4 Allen, 177.

*C. R. Train*, Attorney General, for the Commonwealth, to the point of the sufficiency of the evidence for the jury, cited *Commonwealth v. Gillon*, 2 Allen, 505.

CHAPMAN, C. J. The point is again made, that the seizure process does not lie against a carrier transporting liquor to a third person as the owner, to be illegally sold by that person. The decision at the former hearing covered that point, and was affirmed at November term 1871 for Essex, in the case of *Commonwealth v. Intoxicating Liquors, Hugh Owen, claimant*. We see

no reason to doubt its correctness. The language of the thirty-seventh section of the St. of 1869, c. 415, describes a carrier who does not intend to sell the liquor himself, but has reasonable cause to believe that the person to whom he is carrying it intends to sell it unlawfully, and makes him liable to a fine. Section 44 makes the liquor liable to be seized in his vehicle, upon complaint as specified. Section 57 authorizes the seizure by certain officers without warrant. These provisions are not modified by the language of any other section. The seizure is a proceeding *in rem* against liquor *in transitu*. If the person to whom it is to be carried intends to sell it unlawfully, and the carrier has reason to believe this, it is subject to forfeiture as a nuisance. When a claimant comes in, it is the liquor that is the subject of controversy.

The evidence in this case, as to the business, the acts and the language of Maloney, was pertinent, and also the acts and language of the carrier; and we think it was sufficient to authorize the findings of the jury.

*Exceptions overruled.*



COMMONWEALTH *vs.* CERTAIN INTOXICATING LIQUORS,  
George B. Lyman, claimant.

Intoxicating liquors kept for sale in this Commonwealth in violation of law may be seized and forfeited as a nuisance, under the St. of 1869, c. 415, although they are so kept by a bailee in fraud of their owner, and he is innocent of the illegal purpose of the keeper.

COMPLAINT on the St. of 1869, c. 415, § 44, to a trial justice for a warrant to search for certain intoxicating liquors alleged to be kept by John Parks and Joseph Lafleur in Huntington on July 25, 1870, for unlawful sale in this Commonwealth. Six barrels and one cask of intoxicating liquors were seized on the warrant. As the trial justice was of opinion that their value exceeded twenty dollars, notice was issued to Parks and Lafleur, and all other persons claiming any interest in the liquors, to appear in the superior court; and George B. Lyman appeared accordingly as claimant of five barrels of the liquors, and no claimant appeared of the residue.

At the trial in the superior court, before *Pitman, J.*, judgment was ordered for a forfeiture of all the liquors, and the claimant alleged exceptions, which referred to the preliminary proceedings and continued as follows :

“ Lyman testified that he resided in Ohio, and was a manufacturer and dealer in liquors ; that early in June 1870 at Huntington, where he formerly resided, he asked Parks, who resided there, if he wished to buy any liquors, and Parks declined, saying that he should buy none unless a license law should be passed, but that the prospect was that the legislature would pass a license law, and in that case he might want some ; that the witness then asked Parks if he could store five barrels of liquors for the witness, subject to his order, and ship the same as he might order, and Parks agreed to do so ; that the witness engaged the freight agent of the railroad company to notify Parks when the liquors should arrive, and subsequently, on June 21, the witness shipped the five barrels from Ohio, consigned to himself at Huntington ; that he had no intention of selling any of the liquors in this Commonwealth contrary to law, nor unless a license law should be enacted ; that in July, hearing that the legislature had adjourned without passing a license law, he sold all the liquors to a person in Connecticut, and when he ordered them to be shipped to Connecticut he learned that they had been seized under the warrant in this case ; that he did not know Lafleur, and had nothing to do with him in the matter ; that Parks was only to store the liquors, and had no authority to sell or appropriate any part of them ; and that there was no arrangement by which Parks might take or sell any of them in any contingency.

“ Parks testified that, when he was informed that the liquors had arrived at Huntington, he spoke to Job Little, who was occupying the store-room, where the liquors were seized, under a lease from Parks, who owned the building, about storing them for Lyman, and Little agreed to store them and did so ; that the witness had no occupancy of the room, and nothing more to do with storing the liquors than thus engaging Little ; that neither he nor Lafleur had any authority from Lyman to sell or appropriate any of the liquors ; and that he had not sold or taken any of them.

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"The Commonwealth relied on evidence tending to show that the liquors were kept in same room with other liquors of Parks & Lafleur, and all were intended for sale by Parks & Lafleur in another place than the store-room, to wit, their hotel nearly opposite, and were removed from the store-room to the place of sale in small quantities, as wanted for sale.

"The claimant contended that, if the liquors were sold, or kept for sale, by Parks & Lafleur, they were guilty of an unlawful conversion of them; and asked the judge to rule that if the liquors were the property of the claimant, and were stolen from him by Parks & Lafleur, the verdict should be for the claimant; but the judge declined so to rule, and ruled and instructed the jury as follows: If the jury are satisfied that Parks & Lafleur were carrying on this hotel, and that Lyman left these liquors for storage with Parks as stated by Lyman, and Parks & Lafleur at the time of making this complaint kept these liquors for the purpose of being sold at their hotel in violation of law, the same would be liable to forfeiture, and the jury would be authorized to find the issue submitted to them in favor of the Commonwealth, although the jury should believe that Lyman remained the owner of the liquors, and they were sold or kept for sale without his authority or knowledge.

"The jury rendered the following verdict signed by their foreman: 'The jury find that all of the liquors described in the return on the warrant in this case, and seized by the officer under the proceedings in this case, were kept, at the time of making the complaint, by the persons alleged therein, as alleged in said complaint, for the purpose of being sold in violation of law of this Commonwealth;' and the claimant alleged exceptions to the foregoing rulings and instructions."

*W. Allen & D. W. Bond*, for the claimant. 1. The instructions were erroneous, in that they permitted the jury to return a verdict of forfeiture if the liquors were kept for sale by a person who acquired and held possession of them against, and not under, the right of the owner. *Fisher v. McGirr*, 1 Gray, 1, 26, 27, 35, 37. *Trueman v. Casks of Gunpowder*, Thacher Crim. Cas. 14. *Peisch v. Ware*, 4 Cranch, 347. *United States v. Guillem*,

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11 How. 47. *Ham v. McClaws*, 1 Bay, 93. The instructions assumed that Parks & Lafleur were bailees of the property at the time when it was unlawfully converted; or that it was immaterial whether they were or not. Whether Parks was ever bailee; whether he continued to be such at the time of the conversion; whether, if so, the conversion was effected by Lafleur alone, and Parks was to be held as a subsequent co-keeper with him only from the partnership relation; were all questions on which there was evidence for the jury.

2. If Parks, having lawful possession of the property, embezzled it, and with Lafleur kept it for sale, that would not work a forfeiture. The criminal intent which is the ground of the forfeiture must be that of the owner, or of some person in possession under him who in that respect acts under his authority, express or implied. The embezzlement terminates the bailment; and the possession afterwards is held as much against the owner, as if the original taking had been tortious. This is not a case where the forfeiture arises from the act or condition of the property, but from the intent of the keeper; the object is punishment as well as prevention. *Fisher v. McGirr*, 1 Gray, 1, 26, 85. 1 Bishop Crim. Law (4th ed.), §§ 696–698, 703, and cases there cited. Marshall, C. J., in *United States v. Schooner Little Charles*, 1 Brock. 347, 354. If A. hires B. to store his property, he is no more guilty, or less unfortunate, if B. embezzles it, than if C. steals it.

*C. Allen*, Attorney General, for the Commonwealth.

CHAPMAN, C. J. The seizure of liquors under the St. of 1869, c. 415, because they are kept for sale illegally, is a proceeding *in rem*, which regards such liquors as a nuisance. The statute permits the keeper or any other person to come and claim them as his property; and if they appear to be his, they are delivered to him, unless they are so kept as to constitute what the statute regards as a nuisance. By § 51, if it appears that the liquor, or any part thereof, was, at the time of making the complaint, owned or kept by the person alleged therein, for the purpose of being sold in violation of this act, the court or justice shall render judgment that such or so much of the liquor so seized as was so

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unlawfully kept, and the vessels in which it was contained, shall be forfeited to the Commonwealth. If the claimant was not the keeper, his intent is not made material. The liquors are forfeited on account of the intent with which they were kept. The object of the legislature was to adapt the process to the nature of the evil to be prevented. *Fisher v. McGirr*, 1 Gray, 1, 27.

Legislation of this character is not novel. *United States v. Brig Malek Adhel*, 2 How. 210, 233, is a strong case, and states the principle on which such legislation rests. A brig was seized under the act against piracy, and was condemned to be forfeited, though the owner, who was the claimant, was innocent of any offence. The court said that the innocence of the owner could not withdraw the vessel from the penalty of confiscation; that the vessel was treated as the offender, — as the guilty instrument or thing to which the forfeiture attached; that this is done from the necessity of the case, and the same doctrine is familiarly applied to cases of smuggling and other misconduct under our revenue laws, and cases arising under non-intercourse laws or an embargo. Authorities are cited by the court, showing that the English law is the same. The ship is held liable for the torts and misconduct of the master and crew, of which the owner is ignorant.

This principle of legislation has been acted upon in this Commonwealth in other cases, not relating to the traffic in liquor. By Gen. Sts. c. 26, a great variety of nuisances may be removed, or ordered to be removed by the proper officers; and by § 12, they may be destroyed. Or if the claimant had owned a valuable dog, and sent him here to be kept according to law, and his agent had kept him illegally, or if a trespasser had done so, it would have been the duty of the officers of the law to kill him.

There is nothing in the reported facts to exempt this liquor from forfeiture. It was no less a nuisance, and subject to be seized and forfeited, than if the claimant's agent had acted by authority from him; and no issue is to be framed under the statute, to try the question whether the claimant authorized the sales. The instructions given to the jury were correct. The jury must

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Commonwealth v. Irwin.

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have found, under the instructions, that the liquors came into the hands of Parks by his consent. There was nothing to show that they were stolen.  
*Exceptions overruled.*

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## COMMONWEALTH vs. JAMES IRWIN.

On the trial of an indictment, the omission of any direct testimony to the time of the commission of the offence, except a statement of the principal witness for the Commonwealth that he thinks it was committed on a certain day, which was in fact after the finding of the indictment, does not entitle the defendant to a ruling that there is no evidence to warrant a conviction, if there is other evidence, tending to identify the offence testified to with the offence charged, and sufficient to warrant the jury in finding that the witness was mistaken in time, and that it was committed before the indictment was found.

INDICTMENT found and returned at June term 1869 of the superior court, charging that the defendant on the 26th of December last past stole four hides, being raw skins of beeves, of the property of Myron D. Ballou, at Williamsburg. Trial at June term 1871, before *Pitman*, J., who allowed the following bill of exceptions :

“At the trial, the principal witness for the Commonwealth, Myron D. Ballou, testified that he saw the defendant (in the latter part of December 1869, ‘I should think’) come towards his market in Haydenville, about nine o’clock in the evening, from the direction of a pile of hides, and that as he came up to him he dropped a hide and said it was nothing but boy’s play ; that the hide was one taken from the pile of hides, and had been carried some three or four rods ; that he discovered on the same day that three or four of the hides in a pile near the shed a few rods from the market had been drawn out from the pile and laid by themselves ; that the defendant had no horse ; that it was a bright moonlight night, and he could see clearly quite a distance ; that there did not appear to be any attempt at evasion ; and that the hides were those of beeves.

“Simeon C. Smith, in the employ of the last witness at the time, testified that he was in the market at the time the defendant passed by on the night in question, but did not see him with the hide, and saw the hide there on the ground ; did not recollect



the time this took place ; saw the defendant afterwards, and he said he had no notion of stealing this hide, and it was mere boy's play ; said to him that it was not much boy's play ; and he said, ' If you will let it drop, Monday morning I will come and settle with you.'

" This was substantially all the evidence of the Commonwealth. The defendant requested the judge to rule that, as a matter of law, there was no evidence to warrant a conviction of the defendant of the offence charged in the indictment ; and the judge refused so to rule. No request was made for any ruling as to the time of the alleged offence ; no other request whatever for ruling was made than as above stated ; nor was the attention of the court or the district attorney called by the defendant's counsel to the discrepancy between the time stated by the witness and the time of finding the indictment or the time stated in the indictment, until after the jury had returned their verdict. The judge instructed the jury as to what constituted the crime of larceny, in a manner not objected to. The case was submitted to the jury without argument, and they returned a verdict of guilty. The defendant excepted to the refusal so to rule as requested ; and the indictment is made part of the case."

*W. Allen & D. W. Bond*, for the defendant. 1. The defendant could not legally have been convicted of the offence charged, and the judge should have so ruled ; for the offence (if any) proved was committed after the finding of the indictment.

2. The point was covered by the ruling requested. The defendant's counsel were not asked to state the grounds upon which their request was based.

*C. Allen*, Attorney General, for the Commonwealth.

MORTON, J. This is an indictment for a larceny of four hides alleged to have been committed on the 26th of December 1868. It was returned into the superior court at the June term 1869. The principal witness of the government testified to circumstances tending to show the larceny of hides by the defendant as alleged in the indictment, but fixed the time as " the latter part of December 1869." Another witness testified to circumstances corroborating the first, but stated that he could not recollect the time. The trial was at June term 1871.

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Commonwealth v. Wright.

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We think the presiding judge was right in refusing to order a verdict of acquittal. There was competent evidence tending to show that the defendant committed the offence charged in the indictment. The fact that one of the witnesses fixed the time at a date subsequent to the finding of the indictment, is not conclusive. There were other facts and circumstances, tending to identify the offence testified to with the offence charged, and it was for the jury to say whether the witness fixed the wrong date by accident or mistake. Under the instructions, they must have found that the larceny was committed prior to the finding of the indictment, and that the witness inadvertently or by mistake fixed the wrong date.

*Exceptions overruled.*

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## FRANKLIN COUNTY.

### COMMONWEALTH vs. HENRY WRIGHT.

On a criminal trial at which the defendant was a witness by his own request under the St. of 1886, c. 260, he requested a ruling that the presumption was in favor of his veracity like any other witness, but the judge refused so to rule, and instructed the jury that there was no presumption either way as to the truthfulness of a defendant's testimony, and it was to be allowed such weight as in their judgment it ought to have, taking all the circumstances of the case and other evidence into consideration. *Held*, that the defendant had no ground of exception.

**INDICTMENT** for riotously assembling at Charlemont with divers other persons, to the jurors unknown, to the number of twelve, to break the peace, and, being so assembled, breaking and entering the dwelling-house of Almon Harris and assaulting Laura A. Harris, his wife, and removing her from the house and restraining her of her liberty.

Trial and verdict of guilty in the superior court, before *Lord, J.*, who allowed a bill of exceptions of which the following are the material parts: "That the offence had been committed by certain persons was not denied; and it was admitted or proved that those who committed the crime did it while masked. But it was denied that the defendant was present at the time of the commis-

sion of the offence, or had anything to do with it. In his argument to the jury, the district attorney contended that the defendant (who had testified in the case and denied that he was present or had anything to do with committing the offence) would commit perjury and under oath deny all knowledge of the offence, because he had committed the offence under a disguise.

“In connection with this point, and for a general application to the case, the defendant requested the judge to instruct the jury that the presumption is in favor of the truthfulness of defendants in their statements and testimony on the stand, as in the case of other witnesses. But the judge declined to give the instruction as requested, and instructed the jury that there was no presumption either way, as to the truthfulness of defendants’ testimony; that such testimony was to be considered and weighed by them, taking all the circumstances of the case and all the other evidence offered into consideration, and giving such weight to the testimony as in their judgment it ought to have.”

*S. T. Field*, for the defendant.

*C. Allen*, Attorney General, for the Commonwealth.

BY THE COURT. The court rightly instructed the jury that there is no presumption either way as to the truthfulness of a defendant’s testimony, and that his testimony was to be considered and weighed by them, taking all the circumstances of the case and all the other evidence into consideration, and giving such weight to the testimony as in their judgment it ought to have.

The St. of 1866, c. 260, which enables a person on trial for an alleged crime to be a competent witness at his own request, but not otherwise, expresses no such presumption, and, considering his interest in the result of the trial, it is not a presumption arising out of his relation to the case or any other appreciable cause, so as to be properly stated as a rule of law.

*Exceptions overruled.*

## COMMONWEALTH vs. SIMEON CANADA.

A complaint for keeping or owning an unlicensed dog may allege that the unlawful act extended over many successive days, and be sustained by proof applying to any part of the period.

The owner of a dog not licensed as required by the St. of 1867, c. 130, §§ 1, 2, is not liable as a penalty under § 5, if he is not the keeper of the dog.

COMPLAINT on the St. of 1867, c. 130, § 5, to a trial justice, with two counts, the first alleging that the defendant was the keeper of an unlicensed dog on May 1, 1871, and from that day till July 18, 1871, at Rowe, and the second making like allegations against him as owner of the dog.

Trial and verdict of guilty in the superior court, on appeal, before *Lord, J.*, who allowed a bill of exceptions which referred to the complaint and continued as follows: "Evidence was introduced tending to show that the defendant was the owner and keeper of an unlicensed dog from the 23d of April to the 18th of July 1871. There was evidence for the defence controverting this position, and no specific evidence of ownership and keepership on the 1st of May was given. The judge ruled that under this complaint evidence that the defendant was owner and keeper or owner or keeper of the dog at any time set forth in the complaint would warrant a conviction, to which ruling the defendant excepted." After verdict the defendant moved to arrest judgment on the ground that no offence was sufficiently set forth and charged against him in the complaint; and the motion was overruled.

*W. S. B. Hopkins*, for the defendant.

*C. Allen*, Attorney General, for the Commonwealth.

GRAY, J. Upon the question of time, the defendant has no ground of exception. As the act of keeping or owning an unlicensed dog is one which may extend over many successive days, it may be so alleged. And the proof was confined within the time covered by the allegation.

But we are of opinion that the other point made in the argument for the defendant must be sustained, and that the ruling excepted to, as reported in the bill of exceptions, was inaccurate.

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In stating that evidence that the defendant was the owner of the dog, though not the keeper, would warrant a conviction. The St. of 1867, c. 130, in §§ 1, 2, indeed provides that every "owner or keeper of a dog" shall cause it to be registered, numbered, described and licensed. But § 5, on which this complaint is founded, imposes the penalty sued for only on "any person keeping a dog contrary to the provisions of this act." The effect of the provisions of the statute, taken together, is that the duty of causing the dog to be registered or licensed may be performed by either the owner or the keeper; but if this is not done by either, the penalty falls upon the keeper only. The insertion of both words "owner" and "keeper" elsewhere throughout the statute adds significance to the omission of the one in the fifth section. *Jones v. Commonwealth*, 15 Gray, 193. In *Commonwealth v. Brimblecom*, 4 Allen, 584, the defendant admitted that he was both owner and keeper, and no question arose or was considered as to the difference between the liability of the two.

*Exceptions sustained.*

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THOMAS B. CLARK *vs.* CORNELIUS KELIHER.

A written notice of the landlord to determine the estate of a tenant at will in a dwelling house where he resides with his wife, which is served by leaving it with her there while he is out of the town, is not invalidated by a mistake in his name, if she understands that it is intended for him.

One who has continued to occupy a dwelling-house, with his wife and family and furniture, for five days after his estate as a tenant at will has been determined by notice from the landlord, cannot maintain an action of tort against the landlord for then peaceably entering the house at a time when the plaintiff was out of the town and his wife and family were temporarily absent, and setting the furniture out of doors, and preventing them from reëntering the house; although the furniture remained without shelter during the ensuing night, and was rained upon the next day before the plaintiff's wife was able to store it.

One on whose close hens are trespassing has no right to kill them, although, in consequence of former like trespasses, he has asked their owner to shut them up and threatened to kill them if he should not do so.

TORT, brought originally before a justice of the peace, who gave judgment for the plaintiff. The defendant appealed to the superior court, where the facts were agreed as follows :

“ The defendant, by an oral lease, rented a tenement house and small lot of land on Devens Street in Greenfield to the plaintiff, at the rate of seven dollars per month. The plaintiff began to occupy under his lease May 7, 1870. On the 7th of June the rent was paid. The defendant left the following notice, signed by him, at the house of the plaintiff, with his wife, on the 7th of June, the plaintiff being out of town; and she then understood that it was intended for her husband and herself: ‘ To John Clark and wife. I hereby give you notice and require you to quit and deliver up to me, on the 7th day of July next, the possession of the dwelling-house, with the appurtenances thereto, which you now hold under me, situate on Devens Street in Greenfield, and next west of my own house occupied by me, as I wish then to terminate any tenancy or right in you to occupy said house after that time. June 7, 1870.’

“ On the 12th of July, no further rent having been paid, the defendant, who had been watching for the opportunity, found the house temporarily vacant (the plaintiff’s wife having gone up to the street, and the plaintiff’s children being about in the yard and one of them on the upper door-step) took peaceable possession of the house, and proceeded to put the plaintiff’s furniture out of doors, and fastened the doors, and prevented the plaintiff’s wife and children from reoccupying the house. The plaintiff’s wife knew of the removal, at once. The plaintiff was away from home, being a travelling peddler. The goods and furniture remained out of doors over night, and the next day were wet by a rain, and damaged, before the plaintiff’s wife (the plaintiff being out of town) was able to find a place to put them in. The damage to the goods by being thus put out of the house was ten dollars.

“ The plaintiff kept a number of hens, and suffered them to go at large. The defendant occupied the adjoining lot. The plaintiff’s hens ran into the defendant’s grass and made nests therein, to some extent. A path was made in the grass. The defendant requested the plaintiff to shut up his hens, and threatened to kill them if they were not. The plaintiff neglected and declined to do so. The hens continued to go upon the defendant’s land,

when the defendant openly, with a stick, killed the whole lot of hens, and put them down in the plaintiff's door-yard. The value of hens thus killed was five dollars."

*C. C. Conant*, for the plaintiff. 1. Although the plaintiff's wife understood that the notice addressed to John Clark was intended for her husband, it does not follow that he understood it so; and if he did not, it was insufficient, and the defendant was a trespasser in entering the house and removing the furniture.

But even if the notice was sufficient, the facts show that the defendant removed the furniture without due care, in that he removed it at a time when the plaintiff's business kept him out of town and when it was exposed to rain. There is no presumption that the plaintiff's wife was able to take care of it.

2. The defendant was not justified in killing hens trespassing on his land. *Johnson v. Patterson*, 14 Conn. 1. He had his remedy at law for the trespass. 3 Bl. Com. 211. If a lawful fence will not avert the incursions of tame winged animals, protection is to be sought from the legislature. The plaintiff's silence or inaction raises no presumption of an assent on his part to the slaughter. No license to do an unlawful act can be implied.

*W. S. B. Hopkins*, for the defendant. 1. The defendant was justified in ejecting the plaintiff's family and furniture, if the notice to quit was good. *Meador v. Stone*, 7 Met. 147. *Curtis v. Galvin*, 1 Allen, 215. Taylor Landl. & Ten. § 523. The facts show that it was good, unless the misnomer of the tenant vitiates it. The misnomer does not vitiate it, especially as it does not appear that he was misled. Taylor Landl. & Ten. §§ 481, 483, 484, and notes, and cases cited.

2. The law would not authorize killing another's cattle *damage feasant*. They may be impounded; and they can be fenced against. But in the nature of things the rule does not apply to hens. They cannot be impounded, or fenced against except by such fences as the law does not require a man to maintain; and they are capable of great mischief. Tort against their owner is not an adequate remedy, if he is without property; and although the tort is in the nature of a nuisance, it cannot be enjoined or

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abated by the courts. If then a person aggrieved by repeated acts of depredation by an impecunious neighbor's hens has no right to kill them after due notice, he is without an adequate remedy. It is the notice, and the subsequent conduct of the owner of the hens in wilfully or negligently permitting them to do damage to another's property, that justifies the killing. The case at bar shows repeated acts of damage after notice; and also that the defendant killed the hens openly and delivered their bodies to the plaintiff. It even seems a licensed killing.

AMES, J. 1. The notice to quit was sufficient and lawful, both in substance and in the mode of service. There was no uncertainty as to the party from whom it emanated or the tenement to which it applied, and there could have been no doubt that it was meant for the family occupying that tenement. The mistake in the christian name of the tenant was therefore of no importance; and as on account of his absence the notification could not be delivered to him personally, it was properly served by leaving it at his dwelling-house, in the hands of his wife. *Doe v. Spiller*, 6 Esp. 70. *Jones v. Marsh*, 4 T. R. 464. *Blish v. Harlow*, 15 Gray, 316. *Walker v. Sharpe*, 103 Mass. 154.

As the estate of the tenant in the premises had been regularly terminated, and ample time and opportunity had been allowed him for the removal of his furniture, he has no ground of complaint as to the manner in which the defendant took possession. *Meador v. Stone*, 7 Met. 147. *Curtis v. Galvin*, 1 Allen, 215.

2. But the act of killing the plaintiff's hens was without legal justification. It is admitted that a landowner has no right to kill his neighbor's cattle when found trespassing, but must content himself with his legal remedies, of impounding, or bringing a suit at law. The destruction of valuable property is not necessary to the protection of his rights. And this rule applies as well to feathered animals not *feræ naturæ*, as to larger and more valuable animals. Animals fully reclaimed and used for burden, husbandry or food, are property of intrinsic value, and as such are under legal protection. *Blair v. Forehand*, 100 Mass. 136, 140. The notice given of his intention to kill them would be a mere threat to do an illegal act, and would not vary the case. It has



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been decided in Connecticut, that the poisoning of a man's hens, after complaint of repeated trespasses, and warning of an intent to kill them, was a wrong for which an action would lie, and we concur with the reasoning of the court in that decision. *Johnson v. Patterson*, 14 Conn. 1.

*Judgment for the plaintiff for \$5, and interest.*

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AMOS M. CARLTON *vs.* RENSSELAER O. HESCOX.

Evidence of how much hay an ordinary horse will eat in a week is incompetent on the question how much hay was eaten in eight weeks and a half by a horse which was not in an ordinary condition.

CONTRACT on an account annexed for hay fed by the plaintiff to the defendant's horse.

At the trial in the superior court, before *Dewey, J.*, it appeared that the plaintiff was a horse doctor, with whom the defendant left the horse to be doctored; that the horse remained with the plaintiff fifteen weeks; and that it was during eight and a half weeks of this period that the plaintiff claimed to have fed the hay to the horse.

The defendant introduced evidence tending to show that it was agreed by the parties that he should supply the horse's feed while the plaintiff was doctoring the horse; and that he supplied a hundred pounds of meal and twenty-four hundred pounds of hay during the fifteen weeks in pursuance of this agreement. But the plaintiff's evidence tended to show that the quantity supplied by the defendant was much less than that.

"As bearing on the question of the quantity of hay furnished, and consumed by the defendant's horse," the defendant offered to prove, "by persons who had experience in keeping horses and had experimented on the question, how much hay an ordinary horse will eat or consume in a week;" but the judge excluded the evidence as incompetent. The jury found for the plaintiff, and the defendant alleged exceptions.

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Kelher v. Connecticut River Railroad Company.

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*A. Brainard*, for the defendant.

*W. S. B. Hopkins*, for the plaintiff, was not called upon.

BY THE COURT. It did not appear that the horse in question was an ordinary horse; but as the defendant had left him with the plaintiff to be doctored, there was evidence that he was not in an ordinary condition. Therefore evidence as to how much hay an ordinary horse will eat or consume in a week was immaterial, and its rejection furnishes no ground of exception.

*Exceptions overruled.*



DENNIS KELIHER vs. CONNECTICUT RIVER RAILROAD COMPANY.

A railroad corporation omitted to fence the line of its road in front of a culvert under the road bed; and did not construct any barrier to prevent cattle from entering the culvert, although it was practicable to maintain such a barrier without interfering with the flow of the water. The depth of water was usually enough to prevent the escape of cattle from the land of the adjoining proprietor, at the unprotected place; but on a day when the water was low, a cow which he was pasturing there passed through the culvert, and over land of another person on the other side of it, and then entered the road at a place which was also defective for want of a suitable fence, and was there injured by a passing train. *Held*, that the railroad corporation was liable for the injury.

TOET for injuries resulting to the plaintiff's cow through the alleged neglect of the defendants to erect and maintain suitable fences along the line of their railroad. The case was submitted to the judgment of the court upon the following statement of facts:

"The defendants are a railroad corporation, duly created, who located and constructed their road in Greenfield in 1848. The plaintiff is owner of a lot of land, used by him at the time of the injury, as hereafter mentioned, as a pasture adjoining the railroad in Greenfield. In June 1870, the plaintiff's cow, being pastured on said lot of land, escaped therefrom in the way hereinafter mentioned, came upon the defendants' road, and was struck and injured by an engine of a passing train. No claim is made that the defendants were negligent in management of the train. The

cow escaped through an arched brick culvert, six feet high and six feet wide, under the defendants' road, opening from the plaintiff's pasture. Passing through this culvert, she came upon the bed of a former mill pond, as hereafter mentioned, and straying thence a short distance on land not owned by the plaintiff came upon the defendants' track through an opening where the defendants were bound to maintain a suitable fence. A small stream ran through the culvert. The size of the culvert was not larger than was reasonably necessary to convey the running water at its highest flood; but in low water a part of the bed was bare, so much so that the cow was tracked through the culvert. It was practicable to maintain sufficient barriers at or near the mouth of the culvert to prevent the escape of cattle, without interfering with the flow of the water. About ten rods west of the culvert, a mill owner formerly maintained a dam, which set the water back through the culvert and formed a small pond on the plaintiff's land. No fence had ever been erected between the plaintiff's land and the pond. While the dam was maintained, the depth of water in the culvert, and in the pond on the plaintiff's land, was sufficient to prevent any escape of cattle from the plaintiff's pasture. But in the winter of 1869 the mill was burned, and the water thereafter allowed to run off; and the water did not thereafter set back through the culvert. The right of flowage of the plaintiff's land had been taken by said mill owner under the mill act, and damages awarded by the county commissioners. On the plaintiff's side of the track, about fifteen rods north of the culvert, the defendants had drawn in their fence at right angles, thirteen feet, and thence to the mouth of the culvert had set their fence posts on the embankment of the road. South of the culvert, said fence continued from the mouth of the culvert, along said embankment of the road, some twenty rods, and was there brought out to the line of the defendant's land, at a place owned by another person. This fence was so constructed that cattle could not pass directly upon the railroad track. Before the dam had been erected or the water set back, the fence had been erected and maintained in a straight line upon the defendants' land, and was so when the plaintiff purchased said land. Had

the defendants reërected their fence straight upon their line, it would have passed six feet and two inches east of the mouth of the culvert."

If upon these facts the plaintiff could maintain his action, judgment was to be given for him for a certain sum; otherwise he was to become nonsuit.

*G. W. Bartlett*, for the plaintiff.

*S. O. Lamb & A. De Wolf*, for the defendants.

AMES, J. Under the provisions of Gen. Sts. c. 63, §§ 42, 43, it was the duty of the defendants to make and maintain fences suitable for the benefit and security of the landowner and of travellers upon the road, upon both sides of the railroad for its entire length, (with certain exceptions not necessary to be here considered,) and also to "construct and maintain sufficient barriers at such places as may be necessary, and, where it is practicable to do so, to prevent the entrance of cattle upon the road." The duty is imperative, and is expressed in very comprehensive terms. As soon as the mill pond was drawn down, there ceased to be any fence between the lands occupied by the parties respectively, capable of confining the plaintiff's cow within the limits of his inclosure. It was no fault of the plaintiff's, therefore, that the cow escaped from the pasture and wandered upon the railroad and was there killed. It is true that in order to get into a dangerous place the cow had to pass first under the road bed; and, after wandering over land belonging to another person, made her way to the railroad track by passing through an opening in another fence, which the defendants were also bound to maintain.

In this state of facts, there seems to be no reason for excusing the defendants from liability. The statute is not intended to be confined to cases in which cattle pass directly from the pasture to the railroad. It is enough if the escape of the cow was owing to the insufficiency of a fence which the railroad company was bound to maintain, and it is no excuse to the defendants that after she had escaped from that cause she passed over land of another proprietor, and so found her way upon the track, by a similar deficiency at another place, where they were also under the same obligation. The case differs widely from *Eames v. Salem & Lowell*

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*Railroad Co.* 98 Mass. 560, in which the escape of the cattle was owing to the neglect of the plaintiff to maintain his own fence. The escape in that case happened without any fault on the part of the railroad company, and the cattle were unlawfully out of bounds before they reached the point of danger. As between the parties to the present case, however, the escape was owing to the defendants' neglect of duty, and it is not for them to say that the cow was unlawfully allowed to go at large. It would be trifling with the statute to hold that, although the plaintiff has been guilty of no fault, he is to be left without remedy. The case comes within the rule laid down in *Eames v. Boston & Worcester Railroad Co.* 14 Allen, 151.

*Judgment for the plaintiff.*

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**EDWARD C. HAWKS vs. INHABITANTS OF CHARLEMONT.**

A town which has duly chosen surveyors of highways may nevertheless authorize the selectmen to enter into contracts for making or repairing the highways under the Gen. Sta. c. 44, § 11.

A town in which the highways and bridges had been injured by a freshet voted that the selectmen be its agents to repair them. Acting in execution of the purpose of the vote, the selectmen, by their servants, entered a close without the consent of its owner, and took away stone from it to repair a bridge, and by removing the stone exposed part of the close to be washed away by a river. *Held*, that the town was liable in tort to the owner of the close.

**TORT.** The declaration alleged that the defendants by their agents and servants forcibly entered part of the plaintiff's farm in Charlemont, which adjoined the Deerfield River, and tore up the soil, and took and carried away a large quantity of stone and converted it to their use, and in consequence of the removal of the stone the river washed away part of the plaintiff's land, and the rest of it was exposed to similar injury from the river. The defendants answered with a general denial; and set up further, that if the plaintiff should prove that stone was taken from his farm it was not taken in pursuance of any direction, employment or authority of the defendants; that his farm adjoined a public way and bridge, and any acts that were done were for the pur-

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pose of securing and protecting the bridge, and in the opinion of the selectmen it was necessary to take and use the stone for that purpose. Trial in the superior court before *Lord, J.*, who by agreement of the parties withdrew the case from the jury and made a report thereof, of which the following are the material parts :

“ To prove his action, the plaintiff offered to show, that by an unprecedented freshet, which occurred October 4, 1869, the roads and bridges in Charlemont were greatly damaged and many of the bridges swept away, and thereafter, at a town meeting duly called and held prior to the acts complained of, it was voted that ‘ the selectmen be the agents of the town to repair the highways and bridges at the present time, and that they be empowered to appoint such agents to rebuild certain bridges as they think best ’ ; that thereafter, under the employment of the selectmen, various men with teams, against the protest of the plaintiff, were for two or three weeks engaged in drawing stone from the plaintiff’s land as aforesaid, that it might be used in the repair of an abutment and pier of a bridge over said river and in said town of Charlemont, carrying away a very large quantity of stone and other materials from his land situate along the bank of the Deerfield River, which forms the northerly boundary of his farm, and not only doing damage to his land by carting over it, cutting it up, and carrying material from his land which was in itself of value, but also, by removing the stone from the bank of the river and from near the water’s edge, destroying the protection which was necessary for the security of his meadow land adjacent to the river ; that already, in consequence of the acts complained of, the meadow land has been deluged and washed and injured, and is still exposed to greater injury from the same cause, none of which would have occurred were it not for the trespasses complained of ; that all said acts were done with the knowledge of a majority of the board of selectmen, openly and in one of the most public places in the town, and known to be without the consent of the plaintiff ; that under the same vote, and near the same time, materials for repairing the highways and bridges in the town had been taken by order of the selectmen and without the consent of

the owners, and the town by the selectmen had paid their claims for damages, and these payments had been sanctioned by the town at a regular town meeting, and one of the claims of a like character had been paid to the plaintiff; that the bills of labor of all those who were employed in these acts of trespass had been paid by the selectmen in full, save that of one Charles H. Rice, whose bill for work (with full knowledge of all the facts) was paid by a direct vote of the town, the voters at the same meeting and prior to the said vote having been informed in open town meeting that the plaintiff claimed damage for the trespasses about which said Charles H. Rice had been employed, and for which employment he then presented his bill against the town; that the plaintiff's claim for damages, as sued for by the plaintiff, the grounds of his claim, and all the material facts above set forth, had been fully explained and understood in said town meeting, prior to the vote allowing the bill of Rice covering charges for labor of himself and his team in removing the stone from the plaintiff's close, as above referred to as the basis of this action; that the vote of the town was upon an article in the warrant in due form 'to see if the town will allow the bill of Charles H. Rice,' which bill was for work in drawing stone from the plaintiff's land as set forth in his declaration; and that the town voted to allow the bill; that the record of the town would show that surveyors of the highways of the town were duly chosen in the spring prior to the acts complained of; that at a town meeting of Charlemont, when the plaintiff's said claim was presented, no objection was made to the course pursued or the acts done by the agents and servants of the town, and no objection was made to paying something for the damage complained of, the only objection being that the amount claimed by the plaintiff was too great; and that the stone and material which were drawn some distance across the plaintiff's land were employed in the repair and protection of the bridge, and the land injured was part of a large tract adjacent to the bridge.

"If upon the facts above reported, as far as competent evidence, or upon any of them, the plaintiff would have been entitled to a verdict by a jury, then the case is to stand for trial otherwise, judgment to be rendered for the defendants."

*W. S. B. Hopkins, (S. O. Lamb with him,) for the defendants.*

1. Upon the facts stated in his offer of proof, the plaintiff has mistaken his remedy. Gen. Sts. c. 44, §§ 19, 20. St. 1868, c. 264.

2. But if he is entitled to treat the acts done on his land as a tort, as he seeks to do, then his offer fails to show either authority from or ratification by the defendants. The vote of the town appointing the selectmen to repair highways and bridges was unauthorized and void. Gen. Sts. c. 18, §§ 31, 74; c. 44, §§ 6-8. *Benjamin v. Wheeler*, 15 Gray, 486. *Richardson's appeal*, 5 R. I. 606. If valid, it authorized no trespass by the selectmen. *Elder v. Bemis*, 2 Met. 599. *Franklin v. Fisk*, 18 Allen, 211. And the evidence offered to prove a ratification is neither competent nor sufficient for that purpose.

*S. T. Field, for the plaintiff.*

CHAPMAN, C. J. It appears that in consequence of an unprecedented freshet extraordinary measures were necessary in the town of Charlemont, to repair the roads and bridges; that a town meeting was thereupon held, and it was voted that the selectmen be the agents of the town to repair the highways and bridges at the present time, and that they be empowered to appoint such agents "to rebuild certain bridges as they think best." The selectmen employed agents and servants to repair the abutments and piers of a bridge, and took stone from the bank of the river near the bridge and upon the plaintiff's land for this purpose. Materials were taken in like manner from other persons who claimed damages therefor, and the selectmen have paid them and the town has sanctioned the payment. At a subsequent town meeting, the plaintiff claimed damages for this injury, and no objection was made to the claim except the amount. But it is denied that the plaintiff can maintain this action.

It is manifest that the acts of the selectmen were tortious; and if they were done by authority of the town an action of tort will lie against the town. When officers of a town, acting as its agents, do a tortious act with an honest view to obtain for the public some lawful benefit or advantage, reason and justice require that the town in its corporate capacity should be liable to



make good the damage sustained by an individual in consequence of the acts thus done. The contrary doctrine would be injurious to the person damaged and to the agents employed by the town. It would also be injurious to the town, by paralyzing the energies of such agents or officers, as they would be likely to refuse to act when prompt action is important. *Thayer v. Boston*, 19 Pick. 511, 516. *Anthony v. Adams*, 1 Met. 284, 287. *Lawrence v. Fairhaven*, 5 Gray, 110.

The extent of the liability of a master for the wrongful acts of his servant is stated in *Howe v. Newmarch*, 12 Allen, 49. If the act is done without the authority, and not for the purpose of executing the orders or doing the work of his master, the latter is not liable; but if done in the execution of the authority given by the master, and for the purpose of performing what he has directed, he is responsible, whether the wrong be occasioned by negligence or by a wanton and reckless purpose to accomplish his business in an unlawful manner.

By Gen. Sts. c. 44, § 1, the town was obliged to keep its highways and bridges in repair. By § 11, it might authorize its surveyors or any other person to enter into contracts for making or repairing its highways. By § 14, if it neglected this duty, the selectmen might authorize surveyors of highways to enter into contracts for making the repairs. Other sections subject towns to penalties for suffering their ways to be out of repair, and to damages if travellers are injured by such defects.

These statutes made it for the defendants' interest to repair the bridge in question, and authorized the town to pass the vote above mentioned making the selectmen its agents to do the work, and employ servants and agents under them. It was as the agents of the town, that the selectmen took the plaintiff's property and did the injuries alleged; and by the authorities cited above, this action lies.

The plaintiff's claim for damages is not, as the defendants contend, under Gen. Sts. c. 44, §§ 19, 20; for his demand does not arise out of any change in the grade of the road, but is for an illegal taking and injuring of his property outside of the highway. Nor is it for entering upon, using or taking his land for the pur-

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pose of securing or protecting the way or bridge. But it is for taking and carrying away stone to be used in the repair of a pier or abutment, and for consequential damage. Therefore the statute cited above, and the St. of 1868, c. 264, do not apply to the case, and an action at law is the appropriate remedy.

The case is unlike *Barney v. Lowell*, 98 Mass. 570, and the cases there cited, where the parties were not acting as agents of the town.

*Case to stand for trial.*

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OSCAR BARDWELL vs. SAMUEL PURRINGTON.

An instrument executed by overseers of the poor to bind J. S. as an apprentice under the Gen. Sts. c. 111, § 4, which purports to bind him from its date until a day named, "when the said J. S. will arrive at the age of twenty-one years, during which time the said J. S. shall faithfully serve," is not wholly void because under the rule of law excluding fractions of a day in computation of time J. S. will become of full age on the day next preceding that so named, but binds him during his minority.

In an action to recover for work done for the defendant by an apprentice bound to the plaintiff by an instrument executed by overseers of the poor under the Gen. Sts. c. 111, § 4, which recites that the minor's father is "actually chargeable" to the town as having a lawful settlement therein, such recital is *prima facie* evidence of the fact recited.

A parent with whose consent relief is furnished by a town to some of his minor children, by reason of his having a lawful settlement in the town and not being able to support them, is actually chargeable to the town so as to enable the overseers of the poor to bind his minor children as apprentices or servants, under the Gen. Sts. c. 111, § 4.

The mere fact that a person, who employed an absconding apprentice, paid him for his services, affords no defence to an action brought against such person by the master for their value.

CONTRACT on an account annexed for services rendered by George W. Hayden as a farm laborer to the defendant for thirty-six days in the year 1868 at the rate of one dollar per day. Writ dated July 19, 1869. The answer denied any right of the plaintiff to recover for work done by said George, and alleged that, if the plaintiff should prove that said George did any work for the defendant, then the defendant had paid for the same.

At the trial in the superior court, before *Brigham*, C. J., it appeared that George W. Hayden was a son of Samuel Hayden, and was born on September 8, 1852; and the plaintiff introduced

in evidence an indenture made by and between him and the selectmen of Shelburne on April 5, 1861, which set forth "that the said overseers of the poor have bound and do hereby bind George W., a minor son of Samuel Hayden, a poor person lawfully settled in said Shelburne and actually chargeable thereto, unto the said Bardwell, to follow the business of farming or agriculture, and with him to serve from the day of this indenture until the eighth day of September in the year eighteen hundred and seventy-three, when the said George W. will arrive at the age of twenty-one years, during which time the said George W. the said Bardwell shall faithfully serve;" and wherein the plaintiff covenanted to faithfully instruct the said George in the business of farming, and during all said term to provide for his comfortable support in sickness and health, and cause him to be taught in reading, writing, ciphering and "such other branches as are ordinarily taught in common schools," and to pay him \$100 upon his coming of age. It was admitted that a duplicate of this indenture was duly filed with the town clerk of Shelburne.

The plaintiff also put in evidence showing that the apprentice lived with him, under the indenture, from its date until June 7, 1868, when he left the plaintiff's house and went to a house in Coleraine, where his father and mother and some of his brothers and sisters were living; that he then went with his father to the defendant's farm, and hired himself to the defendant to do farm work at the rate of a dollar a day; and that he remained in the defendant's employment some thirty days, when he left it and was employed elsewhere, and was found and taken home by the plaintiff a few months afterwards. "On intimation from the presiding judge, in answer to the plaintiff's inquiry, that no further proof than the indenture was necessary in the first instance to establish the plaintiff's case on the point of the father of the apprentice being chargeable on the town," the plaintiff here rested his case.

The defendant then, being called as a witness, testified that he did not know that George W. Hayden was an apprentice, at the time when he hired him, (but in the course of the trial there was contradictory evidence on this point,) and that the plaintiff never

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gave him notice that he claimed the boy's wages as due to himself under the indenture, until after the boy had left the defendant's service. Thereupon the defendant was asked by his counsel, whether he had paid the boy ; but, upon objection of the plaintiff to the question, the judge excluded it. It was in dispute, and was one of the questions argued to the jury, whether the plaintiff used due diligence to reclaim the boy after he left his house.

Samuel Hayden was a witness for the defendant, and testified "that at the time the indenture was made neither he nor his wife was actually a charge upon the town of Shelburne, or had been so chargeable for four or five months before." The plaintiff, in reply, called Pliny Fisk, one of the overseers of the poor of Shelburne, who signed the indenture, "to establish the fact that the father of the boy was a charge upon said town at said time." The defendant objected, on the ground that it was incumbent on the plaintiff to establish that fact as part of his case in chief, and that it was not matter of reply ; but the judge ruled "that the act of the overseers as evidenced by the instrument raised a presumption that the father was actually chargeable to the town at that time, sufficient to make a *prima facie* case, and it was not incumbent on the plaintiff to establish the fact in the first instance by other proof." Fisk then testified "that from March 1860 to March 1861 Samuel Hayden had been a charge on the town of Shelburne ; that in March 1861, about two weeks before the making of the indenture, said Samuel had of his own motion and at his own expense removed to live in the town of Coleraine, and was no longer a charge on the town of Shelburne ; that he took with him his wife and three children ; that he left two minor daughters in Shelburne, who had been put out by the overseers of Shelburne in families at the expense of the town ; and that they remained in such families on such expense to the town from June 1860 until the June after the making of the indenture, when they rejoined their parents in Coleraine." It also appeared that the town of Shelburne paid the plaintiff one dollar per week for the support of George W. Hayden for about a year, up to April 1, 1861 ; and that when the indenture was made the plaintiff remitted all claim for his support from the 1st to the 5th of April

1861, although the boy remained in his charge, under an arrangement with the overseers, until the making of the indenture. There was no evidence tending to contradict Fisk's testimony, except the said testimony of Samuel Hayden.

The defendant requested the judge to rule "that the indenture was void, because the minor would reach his majority at midnight between the 6th and 7th of September 1873, and the overseers had exceeded their powers in attempting to bind him by indenture until the 8th of September 1873;" but the judge ruled "that the indenture was an efficient instrument to bind the apprentice to the plaintiff during his minority."

The defendant also prayed for a ruling "that the fact that minor children of Samuel Hayden were supported by the town of Shelburne until June 1860, after the father and mother had removed to another town with the rest of the family and had ceased to be in any way supported by Shelburne, did not make the father chargeable to Shelburne, in the sense intended by the Gen. Sts. c. 111, § 4,\* so as to authorize the overseers to make the indenture." But the judge declined so to rule, and on this point instructed the jury as follows: "It being admitted that, for a period of a year previous to the making of the indenture, Samuel Hayden, the father of the apprentice, his wife and all his children, having a lawful settlement in Shelburne, were a charge upon Shelburne; that, two weeks before the making of the indenture, the apprentice's father with all his family, excepting the apprentice and two of his sisters, also minors, undertook his own maintenance, and removed and established himself and family in Coleraine at his own cost; and that the apprentice and his two sisters, after the departure of their father, remained a charge upon the town of Shelburne, with the consent of their father, the apprentice until within five days of, and his two sisters until two months after, the making of the indenture; the jury will find that at the time of the making of the indenture, April 5, 1861, the

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\* "A minor child who is, or either of whose parents is, chargeable to a town as having a lawful settlement therein, or supported there at the expense of the state, may be bound as an apprentice or servant by the overseers of the poor."

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apprentice's father was chargeable upon the town of Shelburne as alleged in the indenture." The judge also gave the following instructions to the jury :

"The defendant's employment in his service, as a laborer, of George W. Hayden, the plaintiff's apprentice by indenture, without the knowledge and assent of the plaintiff, entitles him to recover of the defendant the fair value of the services of such apprentice, whether the defendant at the time of such employment did or did not know that said Hayden was the plaintiff's apprentice.

"If the apprentice of the plaintiff absconded from him, and the plaintiff did not make reasonable efforts to reclaim him, or if, when he had opportunities to reclaim him, or knowledge of him which would enable him to reclaim him, he made no such efforts to do so against the disposition of the apprentice to return to him, and while thus absent the apprentice made contracts for service and performed them and was paid for them with the knowledge of the plaintiff, or was suffered by the plaintiff to perform such contracts without interference by the plaintiff, the jury would have a right to infer a relinquishment by the plaintiff of his rights to reclaim and hold him to his personal service under the indenture, and if under these circumstances the defendant employed him he would not be liable to the plaintiff for the value of these services.

"If the plaintiff had relinquished his rights to reclaim and hold his apprentice, and afterwards the defendant employed him as a laborer, his promise to pay for this service of the apprentice would not in and of itself support this action, but evidence of such promise would indicate that the employment by him of the apprentice was understood by him and such apprentice to be without the knowledge and assent of the plaintiff, and not in pursuance of any relinquishment of the plaintiff's claims to hold said apprentice under the indenture."

The jury found for the plaintiff, and the defendant alleged exceptions.

*W. S. B. Hopkins, (A. De Wolf with him,)* for the defendant.

1. The boy would become twenty-one years of age the first m-

ment of September 7, 1873. Met. Con. 38. There was no right to bind him as an apprentice beyond that time. Gen. Sts. c. 111, §§ 1, 4. The indenture was invalid, because the overseers of the poor thereby attempted to bind him longer. *Butler v. Hubbard*, 5 Pick. 250. *Reidell v. Congdon*, 16 Pick. 44. *Reidell v. Moree*, 19 Pick. 358. *Walker v. Chambers*, 5 Harrington, 311.

2. There was no evidence in chief that the boy's father was chargeable to Shelburne. The plaintiff showed that the boy left his service and hired himself out to the defendant. As he therefore did not base his account on any contract between himself and the defendant, the defendant stood as a third person, against whom nothing could be assumed from the recitals of an indenture to which he was not a party. But such evidence in chief was necessary to sustain the plaintiff's case; and was inadmissible in reply. The judge did not admit it in reply as matter of discretion, but on the ground that it was not incumbent on the plaintiff to establish the fact in the first instance by other proof than the indenture.

3. The authority of overseers of the poor to bind a minor as an apprentice is given by the statute when the minor is chargeable to the town or when either of his parents is so chargeable. Gen. Sts. c. 111, § 4. The indenture in this case recites that the father was "actually chargeable" to the town, as the ground of the act of the overseers; the case must therefore rest on the question whether the father was such an actual charge at the time of the making of the indenture; *Reidell v. Morse*, 19 Pick. 358; and the evidence shows that he was not. Fisk testified that the father had moved to Coleraine of his own motion and at his own expense, "and was no longer a charge on the town of Shelburne." A man is not a charge on a town, or in other words, a pauper, because he is a poor person unable to pay his debts or fulfil his obligations. *Opinion of Justices*, 11 Pick. 538, 540. *Wilson v. Brooks*, 14 Pick. 341. Nor can he be held to be a pauper by reason of some of his minor children having remained, for a short time after he moved away, in those situations where the overseers of Shelburne had formerly put them when he was a pauper and an actual charge to Shelburne. for he would be liable to that

town for their support, which he could not be if himself a charge upon the town. *Hanover v. Turner*, 14 Mass. 227. *New Bedford v. Chace*, 5 Gray, 28. *Stow v. Sawyer*, 3 Allen, 515. Nor does this view work injustice to the town; for it was in the power of the overseers to have bound out the boy on the ground that he was a minor who was himself chargeable to the town.

4. As it was in dispute, and was argued to the jury, whether the plaintiff had exercised due diligence to reclaim the boy, that is to say, whether the plaintiff was not in fault during the time the boy had absconded and was making his own contract, the evidence of payment to the boy should have been admitted. This is especially true in view of the instruction which made payment an important question, in one view of the case, after the evidence of payment had been excluded. Either the ruling or the instruction was erroneous.

*S. T. Field*, for the plaintiff.

AMES, J. A person who was born on the eighth day of September 1852 would become of the full age of twenty-one years if he should live to the seventh day of that month in 1873. He would be entitled to be considered as having attained his majority at the earliest minute of that day. It was not in the power of the overseers of the poor, therefore, so to bind out the minor in this case as an apprentice, that he could lawfully be held to service as such for any appreciable portion of that day. If the indenture necessarily implies an intent on their part to do so, we should be obliged to say that, in so doing, they exceeded the authority given them by statute, and that the act of binding out the minor was void and of no effect. It has been well said that the authority given to overseers of the poor to interfere in the domestic relations of families, and to take children from their parents to be bound out as servants to strangers, is a high and arbitrary, if not dangerous, power, in favor of which nothing should be presumed, and everything required for its lawful exercise must be shown affirmatively. We think however that the obvious intent in this case was only to bind the apprentice for the term of his minority. It was not necessary to fix the exact date of its termination, and, in the absence of any imputation of bad faith,



a slight, accidental and perfectly natural mistake as to the exact date ought not to vitiate the indenture, but will leave it in the same situation, and with the same legal effect, as if no attempt had been made to name the day of the month when the apprentice would become of full age. The court therefore ruled correctly (so far as this objection is concerned) in holding the indenture to be an efficient instrument to bind the apprentice during his minority to the plaintiff.

The overseers, in making the indenture, professed to be acting in an official capacity, and in discharge of a public duty. The court was right in ruling that the recital in the instrument was *prima facie* evidence that Samuel Hayden was a poor person lawfully settled in Shelburne, and actually chargeable thereto; and it is immaterial that the instrument was one to which the defendant was not a party. *Reidell v. Morse*, 19 Pick. 358, 360. It was not conclusive, neither did it shift the burden of proof. And it was discretionary with the court, and therefore afforded no ground of exception, that after hearing the defendant's evidence upon this point the plaintiff was permitted to put in new evidence, by way of rebuttal, of a kind which might have been offered in chief and as part of his original case. And upon the question whether on the fifth day of April 1861 Hayden was chargeable upon the town, as it was admitted that he had been for almost a year before that date, the jury were instructed that if, when he removed to another town, the apprentice and two other children of the family remained, with their father's consent, a charge upon the town, the apprentice until five days before and the other two until two months after the making of the indenture, they ought to find that on that day the father was chargeable upon the town. Relief furnished by the town with his consent to some of his minor children, he not being able to support them himself, is relief to him; and the fact that he had undertaken the support of himself and another part of the family, dependent upon him, would not alter his legal position. He would still be a person receiving aid and support from the public under the provisions of the statutes for the maintenance of the poor. *Wilson v. Brooks* 14 Pick. 841. *Taunton v. Middleborough*, 12 Met. 35. It is true

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that the testimony of Fisk is to the effect that on the removal of Hayden he ceased to be a charge on the town; but upon this point the whole of his testimony taken together is, that, although Hayden personally ceased to be a charge, a portion of his family still continued to receive support from the town; and the jury must have found, under the instructions, that this was with his consent.

With regard to the defendant's offer to prove that he had paid the boy for his labor, we think that at that stage of the case it was rightfully rejected. It was not offered in connection, as we understand the report, with any evidence tending to show that the plaintiff had abandoned any of his rights, or had been wanting in due and reasonable exertion and diligence to reclaim the apprentice. If he had not lost his right to the services of the apprentice by any fault of his own, the fact that a stranger, who had had the benefit of them, had paid a party who had no right to the payment, would be immaterial. There might be circumstances from which the jury might very properly infer that the plaintiff had abandoned the right to hold the apprentice. The propriety of such an inference would depend on what the plaintiff knew, or had the means on reasonable inquiry of knowing, as to where the apprentice was and what he was doing. If the plaintiff knowingly suffered the apprentice to make and perform contracts for service, or if the plaintiff, knowing where he could be found, made no efforts, or neglected opportunities, to reclaim him and hold him to his service, he could not maintain his action, — in other words, his relinquishment of all right to hold the apprentice under the indenture could be proved by circumstantial evidence. Mere payment by the defendant to the apprentice without the knowledge or default of the plaintiff would not affect the question.

The result is, that we find no error in the rulings of the presiding judge; and therefore the *Exceptions are overruled.*

SUSAN F. BURROWS *vs.* EZRA O. PURPLE.

An attachment of estate of a husband upon a libel against him for a divorce is security for all sums which the wife may recover, whether for alimony or other allowance pending the suit or upon the final decree, or for costs and expenses.

Upon a final decree granting a divorce against a husband, the court may award a gross sum to the wife in full of arrears of alimony and her costs and expenses pending the suit, and of future alimony and all expenses of maintaining children of whom she is given the custody.

A final decree, granting a divorce against a husband, and ordering that he pay a gross sum in full of allowances which the court makes to the wife, and that execution issue therefor after the expiration of forty-eight hours, authorizes the issue to her of execution in common form, upon his default to make payment within the forty-eight hours, and its levy upon any of his real estate in the manner in which like executions issued in actions at law may be levied; notwithstanding a further provision of the decree that the sum shall be paid into the hands of the clerk of the court and kept by him until the qualification of a trustee whom the decree appoints to receive and apply it for her benefit.

A writ of entry to recover land which has been set off and seisin and possession thereof delivered to the demandant, on execution upon a decree of alimony made by this court, may be brought in the superior court.

WRIT OF ENTRY, brought in the superior court, to recover land in Gill. Plea, *nul disseisin*. The case was submitted to the judgment of the court upon the following facts agreed by the parties :

On August 1, 1868, the demandant filed in this court a libel against her husband, George R. Burrows, for a divorce from bed and board on the ground of cruelty, and upon that libel caused the land in question to be attached. The court afterwards passed an order for the payment of alimony *pendente lite*.

At September term 1869 that case was heard by the chief justice, a divorce from bed and board decreed, the custody of the two youngest children of the parties awarded to the libellant, and, after the introduction of evidence as to the value of the libellee's property and the amount of his debts, it was further ordered and decreed that "the libellee pay the sum of three thousand dollars, the same to be in full of all costs and expenses of suit, also of all the arrears of alimony that are now due and unpaid, according to the former order of the court, and for all future alimony and also for past and future expenses of maintaining the said two children, and that execution issue therefor after the expiration of

forty-eight hours from the time of entering this decree, but that the said sum be paid into the hands of the clerk, to be by him deposited in bank until a trustee shall be qualified to receive the same in conformity with the terms of this decree." The decree then proceeded to appoint "a trustee to receive said money," he first giving bond with sureties to the clerk of this court for the faithful discharge of the duties of his trust; and further provided as follows: "He is to invest the money in such manner as savings banks are authorized to invest their funds when the same shall be received by him; and out of the income, and also out of the principal if necessary, he shall pay the said costs and expenses, and the said arrears of alimony, and such sums as may be necessary for the support and maintenance of the said Susan F., not exceeding eight dollars per week; and is also to render an account of his doings to this court, whenever he shall be cited to do so."

This decree was entered October 19, 1869. On October 21, after the expiration of forty-eight hours, execution in common form for the sum of \$3000, and based on the decree, was issued from this court; and upon that execution on October 27 the demanded premises and other lands of the libellee were seized, and on November 8, after due appraisal and other necessary proceedings had, set off to the demandant, and seisin and possession given to her by the officer, and the execution returned satisfied.

At the time of the filing of the libel, the libellee was justly indebted to sundry creditors, including this tenant, who on June 7, 1869, severally caused the demanded premises and all the libellee's other real estate in the county of Franklin to be attached in actions upon such debts, returnable to the superior court, and at August term 1869 of that court, to wit, on August 21, 1869, recovered judgments thereon against him. On September 15, 1869, the tenant took out execution on his judgment to the amount of \$1400; and thereupon, on September 20, 1869, the demanded premises were seized, and on October 20, after the appraisal and other necessary proceedings had, set off to him, and seisin and possession given to him by the officer, and the execution returned satisfied. The tenant has since been in possession thereof; and

the trustee appointed as aforesaid, after giving bond as required demanded of him possession of the land before bringing this action.

The title of the husband in the land was subject to no incumbrance except these various attachments. His whole property is insufficient to satisfy the amount decreed to his wife and the debts due to his judgment creditors, exclusive of costs.

The superior court gave judgment for the demandant, and the tenant appealed.

*C. Allen & G. W. Bartlett*, for the demandant.

*W. S. B. Hopkins*, (*D. Aiken & S. O. Lamb* with him,) for the tenant. 1. The tenant's title is perfect, unless defeated by the priority of the demandant's attachment and validity of all her subsequent proceedings.

2. The issue of execution to her in common form, and the proceedings under it, were not in pursuance of the terms or spirit of the decree, which called for a special execution. The decree was for payment of money to the clerk, to be by him paid over to a trustee. No execution could issue to the trustee; his trust was defined to be only to receive, invest and manage money. And in no event were the avails to go into the demandant's hands, even for a moment. The decree gives neither to her, nor to the clerk, nor to her trustee, any right to hold land or sell it. The course pursued defeated the decree, since, if it accomplished anything, it vested an absolute title to real estate in her, which neither the clerk, trustee nor court could control except with her permission.

3. The attachment by a wife on her libel for divorce is not operative against creditors. The attachment of property in ordinary suits is a general one, so that the property shall be "held as security to satisfy such judgment as the plaintiff may recover." Gen. Sts. c. 123, § 32. A wife's attachment in a divorce suit is not a general one, but is specially provided "in order to secure a suitable support and maintenance to the wife and such children as may be committed to her care and custody." Gen. Sts. c. 107, §§ 50, 53. And by § 52 the laws relating to attachments are applied to a wife's attachment only "so far as the same are not

inconsistent" with §§ 50, 51. The words "a suitable support and maintenance," in § 50, are relative, implying that a wife's attachment is to secure her such support and maintenance as is suitable to the wife of a person having such property as her husband possesses; that is to say, she may secure for this purpose what he is worth, to be divided as the court directs, if she prevails. And what a man is worth is the amount of his property less his debts. The statute also, in fixing the purpose of the wife's attachment, does not include those incidents to judgments, such as costs, to secure which ordinary attachments are made, nor even what may be due the wife prior to the decree; but limits the attachment to security for support of the "wife and such children as may be committed to her," that is, support after the decree. It is inconsistent with the practice and theory in regard to alimony, that the creditors of the husband should in any manner suffer. 2 Bishop on Mar. & Div. (4th ed.) §§ 450, 453. The provision of the statute in regard to this attachment looks toward securing the wife from acts of the husband in dispossessing himself of his property, and leaves their rights untouched. Creditors in good faith, enforcing their claims, do the wife no injury; but if her attachment is operative against them, she may unwittingly or fraudulently cause them great loss.

4. The demandant's levy is invalid, because the execution was for the entire sum allowed her by the decree, including not only the future support of the wife and children, for which alone the attachment was authorized to be made, but also "costs and expenses of suit," "arrear of alimony," and "past expenses of maintaining the children," which the statute evidently intended to leave to be acted upon by the court according to the usual practice in divorce suits. "Costs and expenses of suit" may be, and uniformly are, ordered to be paid before trial. And the allowance may be increased from time to time. The same is true of alimony pending the suit. This course was pursued in this case. Gen. Sts. c. 107, §§ 22, 46. The father is responsible in the first instance for the support of the children before they are committed to the mother; and the court may make decrees on this subject also, pending the suit. §§ 32, 37.

5. Unless the decree is to be considered as authorizing an execution only against personalty it is invalid, because there is no authority in the statute for the court to decree a gross sum to a wife as alimony, or allowance in the nature of alimony; except out of the personal estate of a husband. Gen. Sts. c. 107, §§ 43, 45, 46.

6. The decree is erroneous also, in that, beyond its requirement that the husband pay \$3000, it looks only to the creation of a trust for the wife, although the statute only authorizes the appointment of a trustee to hold the "personal estate of the wife, or money in lieu thereof," awarded to her upon dissolution of the marriage. Gen. Sts. c. 107, §§ 40, 41, 46, 47.

7. In any event, this being in effect a proceeding to enforce a decree of the supreme judicial court in a suit for divorce, the superior court has no jurisdiction and the action cannot be maintained. *Allen v. Allen*, 100 Mass. 373.

GRAY, J. This court has long been vested, by successive statutes, with authority, upon granting to a wife a decree of divorce, either from bed and board or from the bond of matrimony, to allow her reasonable alimony out of her husband's estate. Sts. 1785, c. 69, § 5; 1805, c. 57; 1810, c. 119. Rev. Sts. c. 76, § 31. Gen. Sts. c. 107, §§ 43, 44. And the practical construction of these statutes has always been that such alimony might, at the discretion of the court, be ordered to be paid in one gross sum, instead of being made payable at stated periods. *Orrok v. Orrok*, 1 Mass. 341; Rec. 1805, fol. 114. *Livermore v. Boutelle*, 11 Gray, 217. *Chase v. Chase*, 105 Mass. 385. In many other states, also, the word "alimony" is commonly used as equally applicable to all allowances, whether annual or in gross, made to a wife upon a decree of divorce, under similar statutes. *Parsons v. Parsons*, 9 N. H. 309. *Whittier v. Whittier*, 11 Foster, 452. *Buckminster v. Buckminster*, 38 Verm. 248. *Sanford v. Sanford*, 5 Day, 358. *Lyon v. Lyon*, 21 Conn. 185. *Piatt v. Piatt*, 9 Ohio, 37. *Hedrick v. Hedrick*, 28 Ind. 291. *Wheeler v. Wheeler*, 18 Ill. 39. *Jeter v. Jeter*, 36 Alab. 391. In England, indeed, the ecclesiastical courts, whose jurisdiction was limited to divorces from bed and board, uniformly ordered alimony to be paid

annually. But the new court of divorce, which has power to render decrees of divorce from the bond of matrimony, is expressly authorized by St. 20 & 21 Vict. c. 85, § 32, if it shall see fit, on any such decree, to "order that the husband shall to the satisfaction of the court secure to the wife such gross sum of money, or such annual sum of money, as, having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it shall deem reasonable." In this Commonwealth this discretionary power has not been limited to cases of divorce from the bond of matrimony, for in the earliest and the latest reported cases upon the subject, alimony in gross was decreed upon a divorce from bed and board for the husband's cruelty. *Orrok v. Orrok*, and *Chase v. Chase*, above cited.

This court is empowered, both during the pendency of the libel and upon a decree of divorce, to make such orders and decrees as it deems expedient for the care, custody and maintenance of the minor children of the parties. Rev. Sts. c. 76, §§ 25, 26. Gen. Sts. c. 107, §§ 32, 33. It is also expressly authorized, from time to time, on the petition of either party, to revise or alter its decrees for alimony or the payment thereof; or, on the petition of a wife who has obtained a decree of divorce, to grant alimony or other provision for her maintenance or for the benefit of the children, although none was made or asked for on the original libel; and, in either case, to make such decree as it might have made in the original suit. Rev. Sts. c. 76, § 36. St. 1853, c. 23. Gen. Sts. c. 107, §§ 47, 48. The court is also now authorized by statute, in every case of libel for divorce, to require the husband to pay alimony pending the suit, and such sum of money as may enable the wife to maintain or defend the libel, although exceeding the taxable costs. Gen. Sts. c. 107, § 22. *Baldwin v. Baldwin*, 6 Gray, 341. It had already the power, as incidental to its jurisdiction of such cases, to award costs to the wife against the husband, both in suits for divorce, and on petitions for increase of alimony. *Wheeler v. Wheeler*, 2 Dane Ab. 310. *Stevens v. Stevens*, 1 Met. 279. *Bursler v. Bursler*, 5 Pick. 427.

The tendency of legislative and judicial action in this Commonwealth has been to assimilate to one another the forms of execu



tions issued by this court in the exercise of the various branches of its jurisdiction. It has long been the practice to issue executions to enforce the payment of alimony awarded upon decrees of divorce, which might be levied like executions in ordinary actions upon personal property or real estate. *Orrok v. Orrok*, *Livermore v. Boutelle*, and *Chase v. Chase*, above cited. *French v. French*, 4 Mass. 587. *Slade v. Slade*, 106 Mass. 499. The general statutes expressly provide that "the court may enforce decrees made for allowance, alimony, or allowance in the nature of alimony, pending libels, or upon or after final decrees of divorce, in the same manner as decrees are enforced in equity;" and "may issue process of attachment and of execution, and all other proper and necessary processes." Gen. Sts. c. 107, §§ 45, 53. And in cases in equity, "the court may issue writs of seisin and execution in common form when such process appears to be an appropriate method of enforcing a decree in equity." Gen. Sts. c. 113, § 23.

Upon libels for divorce from the bond of matrimony for the crime of the husband, and upon libels for divorce from bed and board, "in order to secure a suitable support and maintenance to the wife and such children as may be committed to her care and custody, an attachment of the husband's real and personal estate may be made by the officer serving the libel." Gen. Sts. c. 107, § 50. Such attachment is to be made "in the same manner as attachments are made upon writs in actions at common law," and is to be made upon, and the amount thereof expressed in, the summons or order of notice issued upon the libel. § 51. "All laws relating to attachments of real or personal estate shall apply to attachments herein provided for, so far as the same are not inconsistent with the two preceding sections." § 52. And by those laws both real estate and personal property attached on mesne process are "held as security to satisfy such judgment as the plaintiff may recover," "for thirty days after the judgment, in order to their being taken on execution." Gen. Sts. c. 123, §§ 32, 42. The object of permitting an attachment upon a libel for divorce is declared to be "in order to secure a suitable support and maintenance to the wife and such children as may be committed to

her care and custody ;" that object can only be effected by holding the attachment to be security for all sums awarded by the court, either for alimony or other allowance, pending the suit, or upon the final decree, or for the costs and expenses of the libellant ; and these are the only sums which the libellant can recover upon her libel.

In determining the amount of alimony, regard is always had to the value of the husband's property and income, and the amount of his debts. But when once fixed by decree of the court, it takes precedence, as compared with other debts and liabilities of the husband, not according to the date of the obligation, but from the date of the attachment ; and cannot be set aside or modified, except on petition to the court that made it, sitting as a court of divorce. The wife who has obtained a decree for alimony, upon a divorce, either from the bond of matrimony, or from bed and board, although not strictly a creditor, is so far in the nature of a creditor, that she may avoid a conveyance made by the husband, after committing the act which constituted the cause of divorce, though before the filing of the libel, with intent to prevent her from enforcing any decree of alimony which she might obtain. *Livermore v. Boutelle*, 11 Gray, 217. *Chase v. Chase*, 105 Mass. 385. *Morrison v. Morrison*, 49 N. H. 69. And where there is no question of fraud, her claim for alimony under the statutes and the decree is as much entitled to be secured as the claim of any creditor.

It is within the discretion of any court having jurisdiction in causes of divorce and alimony, to include in one decree alimony since the filing of the libel, if not already paid, as well as alimony for the future. *Robinson v. Robinson*, 2 Lee, 598. *De Blaquiére v. De Blaquiére*, 3 Hagg. Eccl. 322. *Wilson v. Wilson*, 1b 329 note. *Burr v. Burr*, 10 Paige, 20, and 7 Hill, 207. *Forrest v. Forrest*, 25 N. Y. 501. *Barber v. Barber*, 21 How. 582. And under our practice, there is no valid objection to awarding upon the final decree a gross sum in full of all arrears of alimony pending the suit, and of all costs and expenses in the suit, as well of future alimony, and of all expenses of maintaining the children the custody of whom has been awarded to the wife.

The decree of the chief justice, upon the demandant's libel for divorce, for the payment by the libellee of three thousand dollars in one gross sum, was therefore well warranted by law, and the attachment made upon the libel stood as security for the payment of the whole amount. The order "that execution issue therefor" authorized the issue of an execution in common form, and its levy upon any property, real or personal, of the husband, in the manner in which like executions issued in actions at law might be levied. As the real estate attached was not subject to mortgage, the only mode in which the execution could be levied upon it was by setting off the land and delivering seisin and possession thereof to the libellant or her attorney. Gen. Sts. c. 103, §§ 3-8, 15, 16. Her attachment being prior in date to the tenant's, her levy of execution within thirty days after the decree gave a better title than his.

The order for the issue of execution was not affected by the subsequent clause of the decree, directing the sum awarded to be paid into the hands of the clerk of the court, and by him deposited in bank until the qualification of the trustee appointed by the decree, and then received and invested by him, and applied to the wife's support and maintenance. The decree contemplated that the sum awarded should be immediately paid by the husband, gave him forty-eight hours to pay it in, and directed how it should be applied to the benefit of the wife, if so paid. But the sum not having been paid by the husband, there was nothing for the trustee to receive, and it became necessary for the wife to take out execution in accordance with the previous clause of the decree.

It is unnecessary in this case to consider whether, as contended for the tenant, the appointment of a trustee to hold a sum ordered to be paid by the husband by way of alimony, and not in lieu of personal estate of the wife which had come to him by the marriage, was unwarranted by the Gen. Sts. c. 107, §§ 40, 41; or whether it was justified by § 46, which authorizes the court to require sufficient security to be given for the payment, according to the terms of the decree, of any alimony or allowance for the wife and children. If this part of the decree was irregular or

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inappropriate, it may at any time be amended by the court on the petition of the wife or the husband under § 47. But it cannot, in any view, affect the validity, as against the tenant, of the demandant's levy.

This writ of entry is not a process to enforce the decree of alimony, which must issue from this court, within the rule established in *Allen v. Allen*, 100 Mass. 373. That decree has been enforced by the execution already issued, and the setting off and delivery of seisin and possession of the premises to the wife by the officer serving the same. Gen. Sts. c. 103, §§ 15, 16. This is but a writ of entry in the usual form, in which the demandant counts upon the seisin thus acquired by her; and might be brought in the superior court. Gen. Sts. c. 112, § 6; c. 114, §§ 3, 4.

The result of the whole case is, that none of the objections taken by the tenant to a recovery in this action can be sustained, and that upon the facts agreed there must be

*Judgment for the demandant.*

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**ATHOL MACHINE COMPANY vs. LYDIA A. FULLER.**

The promise of a married woman as surety for her husband, without any consideration received by her or benefit to her separate estate, cannot be enforced as a contract in reference to her separate property under the Gen. Sts. c. 108, § 3.

CONTRACT on a promissory note signed by the defendant under date of March 7, 1870, and payable to the plaintiffs or their order, on demand. The answer alleged "that at the time of the execution of the note in suit and at the present time the defendant was and is a married woman living with her husband, Joseph N. Fuller, and that the note in suit was not given by her in relation to any sole and separate property of which she may be possessed, wherefore she does not owe the plaintiffs the amount thereof." The case was submitted to the judgment of the court on the following statement of facts:

"The defendant is a married woman having separate estate and property, and the note was made under the following circum

stances. Some time more than a year before the date of the note, the plaintiffs trusted the defendant's husband with certain articles for sale, upon his oral representation, made without her knowledge and never communicated to her, that, he having no property in his own hands, his wife would be responsible for their amount. Afterwards, and about a year before the date of the note, an agent of the plaintiffs called upon him to pay the amount due for these articles. But he was not able to pay, and wished for further time. The agent told him that he (the agent) would make out a note, and he (the husband) and his wife should sign it, according to the agreement, and the plaintiffs would let the matter rest. This was in the presence of the defendant, who took some part in the conversation. The note was made, signed by the husband and wife, and delivered to the agent. In about a year from its date, the agent called with it at the defendant's house for the amount of it. The husband was not at home, and the defendant was not prepared to pay the note or interest. The agent said that the interest was payable annually, and unless it was collected annually the plaintiffs would lose the interest upon the interest. She asked if no arrangement could be made in regard to the note. The agent suggested that, as she was the responsible party, he supposed a note signed by her alone would be just as good. She replied that she did not see any reason why it should not be just as good. The agent then suggested that the interest should be computed and a new note written for the amount, to be signed by her alone. She assented to this arrangement; the interest was computed; and the note in suit was written for the amount due, and was signed by the defendant after she had examined the figures to see that they were correct, and delivered to the agent, who surrendered the note previously given by the defendant and her husband."

*S. O. Lamb*, for the plaintiffs.

*W. S. B. Hopkins*, for the defendant.

MORTON, J. The consideration of the note in suit was a debt due by the defendant's husband to the plaintiffs, for which she was not liable. The fact that a previous note, signed by her and her husband, of which this note was a renewal, had been given

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does not affect the case. We must look to the original consideration, to see if this note was a contract in reference to her separate property within the meaning of the statute. Gen. Sts. c. 108, § 3. The facts present a case where she was a mere surety for her husband, without any consideration received by her, or any benefit to her separate estate. Such a promise cannot be held to be a contract in reference to her separate property. If it could, then every promise made by her must be so held, merely because it would otherwise be ineffectual. No case has gone to this length. On the contrary, the case of *Willard v. Eastham*, 15 Gray, 328, proceeds upon the ground that such a promise is wholly void at law. We have no doubt that the note in suit is invalid.

*Judgment for the defendant.*

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JOSHUA CRANSON *vs.* DAVID W. GOSS.

One who takes a promissory note, bearing date of a secular day, before maturity, in good faith and for a valuable consideration, may maintain an action thereon against the maker, although the note was in fact so made on the Lord's day that no action could be maintained on it by the original payee.

CONTRACT on a promissory note signed by the defendant under date of December 15, 1869, payable in one year to the order of John Wells and by him indorsed to the plaintiff. Writ dated December 28, 1870. The case was submitted to the judgment of the court on the following statement of facts:

"It is agreed that the plaintiff is a *bond fide* holder of the note in suit, for a valuable consideration; and that he obtained it before it was due, without notice of any defect, illegality or other infirmity in it. It is also agreed that the contract, upon which the note itself was based, was made upon Sunday; and that the note was made, signed and fully delivered upon Sunday, to the original payee. The note bears date of the succeeding Wednesday."

A. *De Wolf*, for the plaintiff.

A. *Brainard & G. W. Bartlett*, for the defendant.

GRAY, J. The ground upon which courts have refused to maintain actions on contracts made in contravention of statutes for the observance of the Lord's day, is the elementary principle that one who has himself participated in a violation of law cannot be permitted to assert in a court of justice any right founded upon or growing out of the illegal transaction.

The general principle was long ago stated by Lord Mansfield, with his usual completeness and felicity of expression: "The objection that a contract is immoral or illegal, as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded on general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff; by accident, if I may so say. The principle of public policy is this: *Ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If from the plaintiff's own statement or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, then the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant were to bring his action against the plaintiff, the latter would then have the advantage of it; for when both are equally in fault, *potior est conditio defendentis*." *Holman v. Johnson*, Cowp. 841, 343.

It is upon this principle, that a bond, promissory note or other executory contract, made and delivered upon the Lord's day, is incapable of being enforced, or, as is sometimes said, absolutely void, as between the parties. *Pattee v. Greely*, 13 Met. 281. *Merriam v. Stearns*, 10 Cush. 257. *Day v. McAllister*, 15 Gray 433. *Towle v. Larrabee*, 26 Maine, 464. *Pope v. Linn*, 50 Maine, 83. *Allen v. Deming*, 14 N. H. 133. *Finn v. Donahue*, 35 Conn. 216. And it follows that as between them it is incapable of being confirmed or ratified; for, in suing upon the original contract after its ratification by the defendant, it would still be nec-

essary for the plaintiff, in proving his case, to show his own illegal act in making the contract at first. *Day v. McAllister*, and *Pope v. Linn*, above cited. *Ladd v. Rogers*, 11 Allen, 209. *Bradley v. Rea*, 14 Allen, 20.

Upon the same principle, if the contract has been executed by the illegal act of both parties on the Lord's day, the law will not assist either to avoid the effect of his own unlawful act. Thus if the amount of a preëxisting debt has been paid and received on Sunday, the law will neither assist the debtor to recover back the money, nor the creditor, while retaining the amount so paid, to treat the payment as a nullity, and enforce payment over again. *White v. Buss*, 3 Cush. 448, 450. *Mills v. Western Bank*, 10 Cush. 22. *Johnson v. Willis*, 7 Gray, 164. If a chattel has been delivered by the owner to another person on the Lord's day by way of bailment or pledge, the latter may retain it for the special purpose for which he received it; or, if it has been delivered to him on the Lord's day by way of sale or exchange, it cannot, at least if he has at the same time paid or delivered the consideration on his part, be recovered back at all. *Scarfe v. Morgan*, 4 M. & W. 270. *King v. Green*, 6 Allen, 139. *Myers v. Meinrath*, 101 Mass. 366. *Horton v. Buffinton*, 105 Mass. 399. *Smith v. Bean*, 15 N. H. 577. *Greene v. Godfrey*, 44 Maine, 25. If a chattel has been sold and delivered on the Lord's day without payment of the price, the seller cannot recover either the price or the value; not the price agreed on that day, because the agreement is illegal; not the value, because, whether the property is deemed to have passed to the defendant, or to be held by him without right, there is no ground upon which a promise to pay for it can be implied. *Simpson v. Nicholls*, 3 M. & W. 240, S. C. 5 M. & W. (Eng. ed.) 702 note; 3 M. & W. (Am. ed.) 244 note. *Ladd v. Rogers*, 11 Allen, 209.

But if the whole evidence shows a complete cause of action, independently of any participation of the plaintiff in an illegal transaction, he may recover. Thus an agreement made on the Lord's day for the use and occupation of land is void; but a subsequent entry upon and occupation of the land will sustain an action upon an implied promise to pay what its use is reasonably



worth. *Stebbins v. Peck*, 8 Gray, 553; explained in *Day v. McAllister*, 15 Gray, 433. So if a written or oral request for the performance of services, and promise to pay a certain compensation therefor, is made and received on the Lord's day, but there is no proof of assent to the request on that day, and the services are performed on a subsequent day, before the request has been withdrawn, the promised compensation may be recovered. *Tuckerman v. Hinkley*, 9 Allen, 452. *Dickinson v. Richmond*, 97 Mass. 45. *Stackpole v. Symonds*, 3 Foster, 229.

The law simply refuses to allow either party to invoke any aid from the court to give effect to an illegal transaction in which he has taken part. An additional illustration of this is afforded by a recent case in this court, in which it was held that if a bargain is made on the Lord's day for a sale of chattels (which is of itself void and incapable of ratification) and the chattels are delivered and accepted on the following day, with the purpose that they be sold and paid for, the seller may recover upon the implied contract of the buyer to pay what they are reasonably worth, and neither party can be permitted to prove the terms, either as to price or warranty, agreed between them on the Lord's day. *Bradley v. Rea*, 14 Allen, 20, and 103 Mass. 188.

The same rule has been applied under statutes which merely prohibited any one from doing on the Lord's day "any labor or business or work of his ordinary calling." Where such a statute prevails, one party cannot sue upon a contract made by him on the Lord's day in the exercise of his ordinary calling, even if it is not within the ordinary calling of the other and the parties met on that day at the request of the latter. *Hazard v. Day*, 14 Allen, 487. But upon a contract made on the Lord's day in the exercise of the ordinary calling of one party, the other may sue, if it was not within his own ordinary calling, and he did not know, when he entered into it, that it was within the ordinary calling of the defendant. *Bloxsome v. Williams*, 3 B. & C. 232; *S. C.* 5 D. & R. 82; 1 C. & P. 294. See also *Emery v. Kempton*, 2 Gray, 257; *Roys v. Johnson*, 7 Gray, 162.

A promissory note given and received on Sunday, and therefore void as between the original parties, might be equally void

in the hands of a subsequent holder who took it with notice of the original illegality. See *Allen v. Deming*, 14 N. H. 133; *Holden v. Cosgrove*, 12 Gray, 216; *Davidson v. Lanier*, 4 Wallace, 447. Even if the note bore date of a Sunday, however, that mere fact would not be conclusive evidence that he took it with such notice; for, though dated on Sunday, it might have been delivered on another day and so valid even as between the original parties. *Hill v. Dunham*, 7 Gray, 543. *Hilton v. Houghton*, 85 Maine, 143.

In the present case, it is agreed that the contract which was the consideration of the note in suit was made on Sunday, and that the note was made, signed and fully delivered on Sunday to the original payee. Clearly therefore he could not have maintained an action upon it.

But it is also agreed that the note bears date of a secular day; and that the plaintiff is a *bona fide* holder of the note, for a valuable consideration, and took it before it became due, without notice of any defect, illegality or other infirmity in the same. The plaintiff therefore, not having participated in any violation of law, and having taken the note before its maturity for good consideration and without notice of any illegality in its inception, may maintain an action thereon against the maker. To hold otherwise would be to allow that party, who alone had been guilty of a breach of the law, to set up his own illegal act as a defence to the suit of an innocent party. This view is supported by the judgments of all the courts, English and American, that have considered the question. *Begbie v. Levi*, 1 Cr. & Jerv. 180; *S. C.* 1 Tyrwh. 130. *Houliston v. Parsons*, 9 Upper Canada, 681. *Crombie v. Overholtzer*, 11 Upper Canada, 55. *Bank of Cumberland v. Mayberry*, 48 Maine, 198. *State Capital Bank v. Thompson*, 42 N. H. 369. *Vinton v. Peck*, 14 Mich. 287. *Silt marsh v. Tuthill*, 13 Alab. 390, 406. And it is in accordance with the decisions of this court upon notes made in violation of other statutes, except those against usury and gaming, which last have often contained peculiar provisions, and, as observed by Chief Justice Shaw, "declared that the note should be absolutely void to all intents and purposes, or, as is sometimes said,

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applied to the contract and not to the party." *Cazet v. Field*, 9 Gray, 329, 381. *Kendall v. Robertson*, 12 Cush. 156. *Williams v. Cheney*, 3 Gray, 215, 222, and 8 Gray, 206. *Phelps v. Decker*, 10 Mass. 267, 278. *Musson v. Fales*, 16 Mass. 332, 335.  
*Judgment for the plaintiff.*

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**SHELburne FALLS NATIONAL BANK vs. WILLIAM P.  
TOWNSLEY.**

Notice of the dishonor of a promissory note, from the holder to an indorser, by a drop-letter deposited in the post-office of the town where the holder resides, addressed to the indorser as if he also resided there, is insufficient without proof that it actually and seasonably reached him, if he resides in another post town, although he is in the habit of resorting to both post-offices.

If the holder of a dishonored promissory note, under cover to whom a notice to an indorser of its protest is seasonably sent by mail by the notary, from another post town where the note was payable, replaces it in the post-office without unreasonable delay, properly addressed to the indorser, it is immaterial to the sufficiency of the notice to bind the indorser, that in the ordinary course of the mails he might have received it sooner if it had been mailed to him directly by the notary.

CONTRACT on two promissory notes signed by Charles W. Stockbridge, payable to the order of Franklin Ballard, indorsed by Ballard and the defendant, and discounted by the plaintiffs.

At the new trial in the superior court, before *Brigham, C. J.*, after the decision reported 102 Mass. 177, the defendant relied upon want of seasonable notice of the presentment and dishonor of both notes. It appeared that they were payable in New York City, one on Thursday, July 5, 1866, and the other on Saturday, July 7, 1866, and demand and protest for nonpayment was seasonably made on each. The defendant admitted that he received through the post-office at Shelburne Falls, in this state, notices of their dishonor, sufficient in form, dated at New York City on the day of maturity of each note respectively, and signed by Myron Winslow, a notary public at that city; but testified that he could not tell when he received them, and thought that he received both at the same time; and produced them, and with them two envelopes addressed to him at Shelburne Falls, one of which bore

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a postmark of July 12, and that corner of the other on which postmarks are usually stamped was torn off.

To prove due notice to the defendant, the plaintiffs, among other evidence, introduced (as at the former trial) the deposition of George W. Warren, who was their cashier at the time of the dishonor of the notes, and who testified that in due course of mail, after the maturity of each note, he received from the notary Winslow on different dates notices of their nonpayment; that there were three notices relating to each note, which were addressed respectively to himself as the plaintiffs' cashier, to Ballard, and to the defendant; that he could not give the precise dates when he sent these notices respectively to the defendant, but that he did so immediately upon receiving them from the notary; that he put each of them into the post-office at Shelburne Falls, addressed to the defendant at that place.

It appeared that Shelburne Falls was a village in the town of Shelburne; that the plaintiffs' bank was in Shelburne; that the defendant lived in the town of Buckland, about midway between Shelburne Falls and the village of Buckland Centre; that there was a post-office at Buckland Centre; and that the defendant was in the habit of receiving letters at both places.

"There was also evidence tending to prove (although the fact was disputed) that ordinarily the defendant was at the village of Shelburne Falls daily, and much more frequently than at Buckland Centre; and that much the larger part of his mail matter came in and went out from the Shelburne Falls post-office, although it was claimed by the defendant that Buckland was his true post-office address.

"The plaintiffs also introduced the testimony of the postmaster at Shelburne Falls, showing that usually letters put into the post-office in New York City during the business hours of any day reached Shelburne Falls during the evening of the following day, from seven to eight o'clock; but that letters mailed in the morning in New York occasionally arrived in Shelburne Falls in the afternoon of the following day. But there was no evidence to show whether the evening mails at Shelburne Falls were distributed on the day or the following day. There was also testimony of

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the postmaster, that the outgoing mails at Shelburne Falls were closed at about noon of each day, in 1866 ; and that at that hour his postmark was changed, so that all letters which were dropped into the office after noon of any day would bear the postmark of the date of the next day ; but that he could not say that the envelope produced by the defendant and bearing the postmark of the 12th of July was not put into the office as early as the morning of the 11th. It was testified to by the plaintiffs' witnesses, and not denied by the defendant, that the mail from New York City to Buckland passed through the Shelburne Falls post-office ; and that letters from New York to Buckland, reaching Shelburne Falls on Saturday, would not arrive in the Buckland post-office till the afternoon of the following Tuesday, and also those arriving at Shelburne Falls on Tuesday would not reach Buckland until the afternoon of the following Saturday, the mails from Shelburne Falls to Buckland leaving Shelburne Falls twice a week, on Tuesdays and Saturdays, at noon."

Upon the foregoing testimony, the judge, against the objection of the plaintiffs, instructed the jury, among other things, as follows: "If in fact the notices thus sent by the plaintiffs were within twenty-four hours after receipt by the bank received by the defendant, he may be charged as indorser. If the notes declared on were protested for nonpayment in New York City on certain days, and if notifications addressed to the defendant were inclosed in an envelope addressed to the plaintiffs at Shelburne Falls, which, if duly mailed there (at New York City) on the next day would in due course of mail arrive at Shelburne Falls on the evening after the second day after such protest (excepting when Sunday intervened between the day of protest and day of mailing) a mailing of such notices, addressed to the defendant at Shelburne Falls, (his residence being in Buckland,) on the next day, would not be seasonable for the purpose of notifying the defendant of such protest and charging him as indorser of said notes as it is necessary that the notices thus remailed and addressed by the plaintiffs should reach the post-office in Shelburne as early substantially as they would have arrived there if mailed and addressed to him at the Shelburne Falls post-office by said notary in New York."

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Under these instructions, the jury returned a verdict for the defendant, and also answered the following questions in the negative: 1. "Did the defendant receive seasonable notice of the protest of the notes in suit, or of the protest of either of them?" 2. "Did the plaintiffs mail the notices at the Shelburne Falls post-office substantially as soon as they arrived there, so that they were in the post-office, addressed to the defendant, substantially as soon as if they had been mailed and directed to him at Shelburne Falls by the notary in New York?" The plaintiffs alleged exceptions.

*S. T. Field*, for the plaintiffs, cited *Seneca County Bank v. Neass*, 5 Denio, 329; *Morris v. Husson*, 4 Sandf. 93; *Bradley v. Davis*, 26 Maine, 45; *Manchester Bank v. Fellows*, 8 Foster, 302; *Jones v. Lewis*, 8 W. & S. 14; *Timms v. Delisle*, 5 Blackf. 447; *Bell v. State Bank*, 7 Blackf. 456; *Fisher v. State Bank*, Ib. 610; *Foster v. Sineath*, 2 Rich. 388; *Carson v. State Bank*, 4 Alab. 148; *Walker v. Bank of Augusta*, 3 Georgia, 486; *Barret v. Evans*, 28 Missouri, 331; *Linn v. Horton*, 17 Wisc. 151; *Eagle Bank v. Hathaway*, 5 Met. 212; *Fitchburg Bank v. Perley*, 2 Allen, 433; *True v. Collins*, 3 Allen, 438; *Cabot Bank v. Warren*, 10 Allen, 522; *Bank of Columbia v. Lawrence*, 1 Pet. 578; *United States Bank v. Carneal*, 2 Pet. 543, 549.

*W. S. B. Hopkins*, (*D. Aiken* with him,) for the defendant.

AMES, J. When this case was before the court on a former occasion it was decided that, under the circumstances, the plaintiffs could not charge the defendant as an indorser, by proof that a notice from themselves had been deposited in the post-office at Shelburne Falls, directed to him as of that place. There was a post-office at the defendant's place of residence, and a letter transmitted by mail would have reached him there. If the plaintiffs saw fit to consider him as residing at Buckland, they could have notified him by mail. If they chose, for the purposes of notice, to treat him as a resident of Shelburne Falls, the drop-letter was not a sufficient notice, without proof that it actually and seasonably reached him. Upon an examination of all the authorities now cited by the plaintiffs, we find no case in which it is held that an indorser, living in a post town, is properly notified by a

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drop-letter, left for him in the post-office in another town, where the holder resides, and addressed to the indorser as if he also resided there, even though it should appear that the indorser is in the habit of resorting to the post-office in each of the two places.

It was also decided at the former hearing, that the defendant might be charged as indorser as upon a notice directly from the notary in New York, if the notice for him was returned to the post-office seasonably, in accordance with the decision in *Eagle Bank v. Hathaway*, 5 Met. 212. This left no question to be tried, except the single and simple one of the truth of the testimony of the cashier, that he addressed and returned the notice to the post-office immediately upon its receipt. If he did so, the plaintiffs were entitled to recover. The case of *Eagle Bank v. Hathaway* assumes that if so redeposited on the same day as received the notice would reach the indorser substantially as soon as if originally directed to him, and holds such notice to be sufficient. If received at night, or after business hours, and redeposited the next day, there might be some question of fact whether the delay over night made any difference. But no such question appears to be raised here.

The answer of the jury to the second inquiry put to them appears to cover the question thus presented. But from the instructions given we are led to apprehend that it was unnecessarily and improperly involved with another question, as to the probability of its earlier receipt, if otherwise directed from New York, depending upon the ordinary course of the mails between these two places. The jury were told that if notices sent from New York on the day after the protest would in due course of mail arrive at Shelburne Falls on the evening of the second day after protest, a remailing of such notices, addressed to the defendant, on the next, being the third day after the protest, would not be seasonable. If the jury followed this instruction, they may have felt bound to answer the second question, as they did, in the negative, without regard to the time when the notice actually reached Shelburne Falls and came to the hands of the plaintiffs' cashier. This would be applying a wrong measure of time, and a wrong test of diligence, to the replacing of the notice in the post-office.

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The question was not what would be the proper time therefor, measured by the ordinary course of the mails from New York, but what was the proper time having regard to the actual receipt of the notice by the plaintiffs' cashier. If he replaced the notice, properly addressed, in the post-office immediately or without unreasonable or unnecessary delay, that was enough to entitle the plaintiffs to recover, although it might have been three or more days after the protest. On this point, we feel bound to

*Sustain the exceptions.*

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JOEL THAYER vs. JAMES WILD.

A workman gave an order on his employer for forty-five dollars per month, to a shopkeeper, as security for future sales of goods by him to the workman. J. S. thereupon signed and delivered to the shopkeeper a writing in these terms: "For value received I guarantee to" the shopkeeper "that I will pay him the forty-five dollars per month, on condition that he does not carry the above order to" the workman's employer. The shopkeeper accordingly never presented the workman's order to his employer, and sold the workman goods from time to time, not exceeding forty-five dollars' worth in any month, for which the workman failed to pay and J. S. refused to pay on demand. Held, that the obligation of J. S. was an original promise, and not a mere guaranty of the debt of the workman; and that his liability thereon was not necessarily measured by the amount of that debt.

CONTRACT. Writ dated November 26, 1870. The declaration alleged "that Samuel Spencer was owing the plaintiff the sum of \$32.58, for goods obtained from the plaintiff's shop, and the said Spencer executed and delivered to the plaintiff a written order" as follows: "Shelburne Falls, January 28, 1869. Lamson & Goodnow Manufacturing Co. Please pay to Joel Thayer forty-five dollars per month until notified by said Thayer to the contrary. For value received. Samuel Spencer;" and "the plaintiff agreed with said Spencer to sell and deliver to him from time to time goods from his said shop, provided the plaintiff ascertained from said Lamson & Goodnow Manufacturing Company that said order so drawn upon them would be accepted by them; and thereafter, on the same day, and before the plaintiff had seen any officer or agent of the said manufacturing company the de-



fendant, for a good and valuable consideration, made, executed and delivered to the plaintiff a written agreement" as follows: "1869, Jan. 23. For value received I guarantee to Joel Thayer that I will pay him the forty-five dollars per month, on condition that he does not carry the above order into the office of the Lamson & Goodnow Manufacturing Co. James Wild;" and "the plaintiff did not carry said order into the office of said company to any of the officers or agents of said company, but relied upon said agreement of the defendant, and the defendant refused to perform his said agreement with the plaintiff, and refused to pay to the plaintiff the amount he guaranteed to pay the plaintiff, although the plaintiff duly requested and demanded the same, and the plaintiff has thereby sustained damage to the amount of \$86.12, the same being for goods delivered to said Spencer after the execution by the defendant of said agreement as aforesaid; and the defendant owes the plaintiff the amount of \$86.12 and interest thereon." The answer denied all the plaintiff's allegations, and alleged that, if the defendant made any written agreement with the plaintiff, the plaintiff had waived all claim to further performance thereof.

At the trial in the superior court, before *Lord, J.*, the plaintiff introduced evidence tending to show that on January 23, 1869, Spencer was owing him \$32 for goods obtained from his shop, and signed and delivered to him the order of that date first set out in the declaration, and thereupon the plaintiff agreed to continue to deliver goods to him from the shop, provided that the plaintiff should ascertain from the proper officer of the Lamson & Goodnow Manufacturing Company that the company would accept the order and make payments on it monthly; that on the same day Wild signed and delivered to the plaintiff the other writing set out in the declaration, and the plaintiff did not carry Spencer's order into the office or to any officer or agent of the company; that the plaintiff thereafter delivered from his shop to Spencer goods to the value of \$443.64, up to January 15, 1870, in no one month delivering more than \$45 worth; that the defendant paid him from time to time, on account of his charges against Spencer for these goods, sums amounting to \$357.52, the

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last such payment being on January 27, 1870; that in delivering the goods to Spencer the plaintiff relied on the defendant's said written promise, and never waived it, and the defendant never rescinded it; that, on two occasions during the time, the defendant directed the plaintiff to cease delivering goods to Spencer, because Spencer was on a spree, and the plaintiff ceased accordingly until the defendant requested that the deliveries should be resumed; that the defendant requested indulgence from time to time in respect to the sums due from him on Spencer's account; that on January 27, 1870, the defendant, when he made his last payment, stated that he knew that he was responsible for the balance then remaining, and asked the plaintiff to give him time, that he might try to get the amount from Spencer; that the plaintiff was accustomed to sign and give the defendant receipts for his payments, in form like the following, which was one of several such receipts called for by the plaintiff and put into the case: "Received, Shelburne Falls, May 22, 1869, of James Wild, thirty dollars on account of Samuel Spencer, and credited the thirty dollars to the account of Samuel Spencer;" that on January 15, 1870, the plaintiff stopped delivering goods to Spencer, who on that day left the town; and that after his said last payment on January 27, 1870, the defendant refused to pay more. It was admitted that Spencer was a mechanic in the employment of the Lamson & Goodnow Manufacturing Company, and that between February 27, 1869, and January 22, 1870, the defendant drew from the company \$444.52 on orders from him.

At the close of the plaintiff's evidence the judge ruled that it would not sustain the action, and directed a verdict for the defendant. The plaintiff alleged exceptions.

*G. W. Bartlett*, for the plaintiff.

*S. T. Field*, for the defendant.

MORTON, J. The evidence at the trial tended to show that the plaintiff, for the purpose of obtaining security for goods which he contemplated selling to Spencer, had procured from him an order upon the Lamson & Goodnow Manufacturing Company for forty-five dollars per month. Before this order was presented for acceptance, the defendant signed and delivered the following

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paper: "1869, Jan. 23. For value received I guarantee to Joe. Thayer that I will pay him the forty-five dollars per month, on condition that he does not carry the above order into the office of the Lamson & Goodnow Manufacturing Co." The plaintiff did not present the order, and thus the condition precedent was performed and the defendant's promise became operative. Relying upon this promise, the plaintiff sold to Spencer goods from time to time up to January 1870. We are of opinion that this was an original promise of the defendant and not a guaranty of a debt of Spencer. The defendant and Spencer were not concurrently liable to pay the same debt. The promise is not to pay for goods furnished to Spencer to an amount not exceeding forty-five dollars per month, but an absolute promise to pay that amount. The words "I guarantee," in the connection in which they are used, are equivalent to "I promise." The liability of the defendant is not necessarily measured by the amount of the debt due from Spencer to the plaintiff. The fact that it was intended as security for the debt of Spencer does not destroy its character as an original contract. It is the same in principle as if the plaintiff had taken a promissory note of a third party to secure any balance which might be due by Spencer. Though it is security, it is not a promise to answer for the same debt.

If the contract in suit be thus regarded as an original promise, we think the evidence in the case would justify the jury in finding for the plaintiff under his declaration, and that the ruling directing a verdict for the defendant because the evidence did not support the declaration was erroneous. The declaration is inartificially drawn, but it alleges in substance that the defendant signed and delivered the written agreement for a good and valuable consideration, that the plaintiff did not present the order referred to in it to the company, and that the defendant has refused to perform his agreement. There was evidence which tended to prove these averments, and we think the case should have been submitted to the jury.      *Exceptions sustained.*

**ABNER WOODWARD vs. ALMIRA P. LEAVITT, executrix.**

On the trial of an action upon a promissory note, which is defended on the ground of its payment to the plaintiff, evidence is immaterial that the defendant was advised by counsel that the defence could not be maintained against a third person, who had brought a prior suit on the note, claiming to have bought it before maturity.

The schedule of assets filed by an insolvent debtor is competent evidence that at the time of filing it he did not own property not included therein.

In an action upon a promissory note, which is defended on the ground of its payment to the plaintiff before maturity, he cannot prove that, after the time of the alleged payment, he offered to transfer the note to a third person without any injunction of secrecy, and the defendant was told of the fact.

On the trial of an action upon a promissory note, which is defended on the ground of its payment, a witness for the plaintiff, after testifying in cross-examination that the question whether the note was paid was much discussed in the community, and he had taken part in such discussions, was asked by the defendant what was his theory of the way in which the plaintiff happened to hold the note if it was paid, and answered that he did not give any theory about the note, but supposed, as others did, how a case might come up. *Held*, that the plaintiff had no ground of exception.

On the issue whether a party repurchased with cash a promissory note from a person to whom he alleged that he previously sold it, evidence is competent that about the time of the alleged repurchase he was an insolvent debtor and a borrower of money to compromise with his creditors, as having some tendency to show that he had not the means with which to pay for the note.

On the trial of an action upon a promissory note, which the defendant contended that he had paid on a certain day, the plaintiff put in evidence that on a certain later day, in front of a tavern which the plaintiff had kept, the defendant said to an insurance agent that he had already told him twice that he should not get his life insured until he paid up the plaintiff, and at the same time pointed to the tavern. Thereupon the defendant was permitted to prove, against the plaintiff's objection, that the plaintiff sold and conveyed the tavern before the date fixed for this conversation. *Held*, that the plaintiff had no ground of exception.

In an action on a promissory note, which is defended on the ground of its payment to the plaintiff before maturity, it appeared that when it matured an assignment of the plaintiff's estate had been made under the insolvent law; and though one of the assignees was a witness on the trial, there was no evidence that the maker of the note ever spoke of it to either of them. *Held*, that the plaintiff had no ground of exception to the refusal of the judge to restrain the defendant from arguing to the jury on this absence of evidence as confirming the defence.

rulings on the competency of evidence offered upon a motion for a new trial are subject to revision on exceptions.

The affidavit of a juror is admissible in denial or explanation of acts and declarations of his outside of the jury room, evidence of which has been introduced in support of a motion for a new trial on the ground that he had formed and expressed an opinion before the trial.

Affidavits of jurors cannot be received, even in support of a verdict, to prove the part taken by any of them in the discussions and votes in the jury room.

On a motion for a new trial upon the ground of the prejudice and bias of one of the jurors, evidence was introduced that before the trial he expressed an opinion of the merits of the case, and did not disclose it upon being interrogated by the court before the case was opened. *Held*, that he might testify, in reply, that the opinion which he expressed was based wholly upon hearsay, and that when he was interrogated he did not remember having expressed it and was conscious of no bias; but that his testimony that he did not vote against the plaintiff till all the other jurors had done so, and the testimony of other jurymen that he did not take part in the discussions in the jury room or attempt to influence them, was inadmissible.

WRIT OF REVIEW, dated June 13, 1870, of a judgment for the defendant in an action brought against her in the superior court on July 25, 1869, upon two promissory notes, made by her testator, payable to the plaintiff or bearer.

At the trial in the superior court, before *Dewey, J.*, it appeared that the notes were each for \$250, dated September 22, 1862, and secured by mortgage, and that one of them was payable April 1, 1867, and the other April 1, 1868. The defence was payment by the defendant's testator on April 17, 1863.

"The defendant testified that, about a year after the death of the testator, who was her husband, which occurred March 28, 1868, her attention was first called to the notes by Dexter Drake, who then claimed to own them, and to have purchased them from the plaintiff before they were due, and in the lifetime of the maker. She testified that she was sued by Drake upon the notes before the commencement of the plaintiff's action. The plaintiff, upon cross-examination, asked the defendant if she did not ascertain from counsel, while the notes were in Drake's hands, that she could not defend against Drake. The defendant objected; and the question was excluded. The plaintiff and Drake were each allowed, without objection, to testify that the defendant did say to them that she had taken counsel and had ascertained that she could not defend against Drake.

"The defendant called the register of the probate court as a witness; and offered to show that the plaintiff filed his petition in insolvency on March 18, 1867; and called upon the witness to produce the schedule of assets filed by the plaintiff. The plaintiff objected; but the judge admitted the schedule signed by the plaintiff, for the purpose of showing that the plaintiff asserted no claim upon the notes at that time.

"The plaintiff, in reply to the defendant's case, called among other witnesses William B. Caswell, and offered to prove that this witness had commenced a suit against the plaintiff in March 1866, and that the plaintiff, in the lifetime of the maker of the notes, offered, without any injunction of secrecy, to turn out the notes to the witness, in payment of the plaintiff's debt to the witness. The defendant objected, and the question was excluded. The witness was allowed to testify that he told the maker of the notes that the plaintiff offered to turn them out to the witness, and what their maker said in reply. It was not shown, nor was any offer made to show, that the witness ever saw said notes.

"On cross-examination of this witness Caswell, the defendant, after showing by the witness that the matter of the notes, whether paid or not, was much talked over in the community, and that he had taken part in various conversations as to the same, asked the witness this question: 'What was your theory as to the explanation of how these notes were in the hands of the plaintiff, if paid?' The plaintiff objected; but the question was allowed, and the witness answered as follows: 'I did not give any theory as to these notes; I supposed how a case might come up; I supposed with others.'

"The plaintiff having stated, as a witness, that he had compromised with his creditors not far from the time when he bought the notes from Drake for cash, was asked, upon cross-examination, whether at a certain time he borrowed money from the Shelburne Falls Bank with which to compromise with his creditors. The plaintiff's counsel objected. The defendant stated that he offered this evidence to show the improbability of the plaintiff's repurchasing these notes from Drake by cash as the plaintiff had stated. The judge said that 'he would allow the defendant to prove that the plaintiff borrowed money about that time;' and admitted the question to be put for that purpose; and the plaintiff answered that he did.

"In reply to the defendant's evidence that the notes were paid April 17, 1863, the plaintiff among other witnesses called Aristides Pratt, who testified 'that in August 1866,' he 'heard a conversation between the maker of the notes and Persis T. Allen, an

insurance agent, in front of the plaintiff's hotel, in which said maker said that he had already twice told the said Allen that he should not get his life insured until he had got Woodward paid up, at the same time pointing to the hotel, which the plaintiff had owned and kept, known as the Franklin House.' To controvert this evidence and contradict the witness, the defendant offered, against the plaintiff's objection, to put in the record of the deed, showing that the plaintiff had sold his hotel March 18, 1866. The judge admitted evidence of the date of the deed as bearing upon the question of time, but for no other purpose.

"In the opening to the jury the defendant's counsel stated that he relied, for proof of payment, upon a variety of circumstances, and among others upon the fact that the maker of the notes never called upon the assignees of the plaintiff to pay these notes, or ever spoke to them about the notes, although one of them became due April 1, 1867, after the appointment of the assignees.

"It was admitted or proved that the notes in suit were two of five given in payment of the purchase money for a farm sold by the plaintiff to the defendant's testator, payable in one, two, three, four and five years from April 1, 1863; and that in April 1863, or at farthest during the year commencing April 1, 1863, the testator paid to the plaintiff all of the other notes, together with a demand note for \$1000, and some \$400 or \$500 besides, and a mortgage of \$800, then on the place, at the time of the purchase due to other parties; and that during the autumn of 1862 he frequently expressed the desire to pay up all of the notes to the plaintiff as soon as possible. There was no evidence that the plaintiff, or any party holding the notes, said anything to their maker, or that he said anything to the holders of the notes, from April 1863 to the time of his death, about the notes or interest. The defendant testified she did not know that any such notes were in existence until about one year after the death of the testator. Samuel D. Bardwell, one of the assignees of the plaintiff, under the insolvency proceedings, was shown to have acted as his agent in compromising with his creditors, doing all of that business for him, the plaintiff not even knowing how much he paid his creditors on the dollar, nor how much to them all.

“From these facts and others, the defendant’s counsel argued that the testator must have understood that the notes were paid. In the closing argument, the counsel was proceeding to argue that nothing was ever said to the assignees by the testator, although he lived a year after their appointment. The plaintiff objected to the defendant’s counsel being allowed to proceed with this line of argument, because there had been no evidence introduced whether the testator had or had not spoken to the assignees about paying up these notes, and no evidence had been offered by either plaintiff or defendant as to this point. One of the assignees, Humphrey Stevens, had been called to identify certain deeds, but was not further examined. It appeared, in the course of the trial, that the assignees had been enjoined by order of the supreme judicial court from proceeding under their appointment, early after their appointment, pending the case of *Day v. Bardwell*, 97 Mass. 246. The judge declined to interrupt the defendant’s counsel, and against the plaintiff’s objection he was allowed to proceed with this argument.”

The jury returned a verdict for the defendant, and the plaintiff alleged exceptions.

*S. O. Lamb & G. W. Bartlett*, for the plaintiff.

*S. T. Field*, for the defendant.

CHAPMAN, C. J. 1. The notes in suit had been given to the plaintiff by the defendant’s testator, who was also her husband. After the testator’s death, the defendant had been sued upon them by Drake, and the first exception is to the refusal of the court to permit the plaintiff’s counsel, on cross-examination, to ask the defendant if she did not ascertain from counsel, while the notes were in Drake’s hands, that she could not defend against Drake. If counsel had told her this, we cannot see how the fact is material to this action, or would affect her defence against Woodward; and we think the refusal was right.

2. The next exception is to the admission of evidence offered by the defendant, that the plaintiff filed his petition in insolvency March 18, 1867, and filed a schedule of assets which did not include these notes. We think it was rightly admitted, for it was evidence having some tendency to show that the plaintiff did not



then have or pretend to have such a claim. If he had them, they ought to have appeared on the schedule.

8. The offer of the plaintiff to prove that he, in the testator's lifetime, offered without any injunction of secrecy to turn out the notes in payment of a debt, and that the testator was told of the fact, was not evidence against the defendant, for the plaintiff could not thus prove his own acts and words; and it was properly excluded.

4. The question put to Caswell in cross-examination, what his theory was at a certain time as to how the notes were in the hands of the plaintiff, brought out nothing in evidence of any materiality, and the point is immaterial. Nor does it appear that the judge might not allow the question to be put on cross-examination, in the exercise of his discretion.

5. The cross-examination of the plaintiff as to his borrowing money at the bank about the time that he said he purchased the notes of Drake, and while he was compromising with his creditors, was admissible; as it had some tendency to show that he had not the means with which to pay for the notes. *Atwood v. Scott*, 99 Mass. 177.

6. The date of the plaintiff's deed, by which he sold his hotel March 18, 1866, was offered to contradict Pratt's testimony as to the time of a conversation, and had some tendency, perhaps very slight, to prove that the conversation could not have taken place as he stated it. It does not appear to have been material, and had no tendency to prejudice the plaintiff.

7. The defendant's counsel was properly permitted to proceed with his argument to the jury, respecting the fact that the testator had never spoken to the assignees in insolvency about the notes; for, though one of the assignees had been upon the stand, there was an absence of evidence on that point which might fairly be presented to the jury.

All the exceptions taken at the trial must therefore be

*Overruled.*

After the verdict of the jury, the plaintiff duly moved in the superior court for a new trial, on the ground that, before the last

trial, one of the jurymen, Solomon Brown, had formed and expressed an opinion on the merits of this case.

"On the hearing of this motion, it was testified by three persons that the jurymen Brown after one previous trial had expressed to each of them, at three several times, that he believed that these notes had been paid; and one witness testified that Brown said he thought 'Woodward was on the catch.' It appeared that the case had been a subject of frequent discussion in the town where Brown and the plaintiff lived, there having been several previous trials.

"Before the case was opened to the jury, the presiding judge, at the plaintiff's request, asked the jury whether either of them had formed and expressed an opinion in this case, or was conscious of any bias, and, if so, to make it known. Brown was examined on the motion for a new trial, and admitted that he heard the question so addressed to him by the judge, but that he had then no recollection of having expressed any opinion, nor was conscious of any bias. He also admitted that, before being summoned as a juror at this term, he had expressed an opinion, after hearing some statements as to the evidence at a former trial, that he thought the notes had been paid; but that he then had no personal knowledge of the facts, and that he had not of late expressed any opinion.

"The judge, against the plaintiff's objection, allowed others of the jury to be examined; and they testified that Brown did not take part in the discussions, and did not attempt to influence them. Brown was also allowed to state, against the plaintiff's objection, that he voted in favor of the plaintiff, and did not vote against the plaintiff till after all the other jurors had. The judge overruled the motion for a new trial."

The plaintiff alleged exceptions to the rulings and decision upon this motion, which were certified by the judge to be truly stated as above, and were allowed, so far as such rulings and decision were proper matters of exception.

These exceptions were argued at this term, and afterwards reargued in writing by the same counsel; and the opinion of the whole court thereon was drawn up by

GRAY, J. The questions presented by the exceptions to the admission of the testimony of the jurors, upon the motion for a new trial in this case, have been fully and ably argued in writing by counsel, and, on account of their practical importance in the administration of justice, and the want of entire harmony in the adjudged cases, have been considered by all the judges, including those who were not present at the term, and after advisement and examination of the authorities, the opinion of the court is unanimous.

A motion for a new trial is addressed to the discretion of the presiding judge; and his decision is conclusive upon the question whether one of the jurors had in fact formed or expressed such an opinion as should disqualify him to try the case, or upon the question whether the party moving for a new trial had seasonably availed himself of the objection, or any other question of fact arising upon the hearing of the motion. But the judge is not at liberty to disregard the rules of law by which the rights of the parties are governed; and upon a motion for a new trial or petition for a review, as well as at any previous stage of the case, questions of law, arising for the first time, relating to the competency of evidence or the merits of the controversy, and the rulings upon which may have affected the final decision, may be revised by this court upon exceptions. Gen. Sts. c. 115, § 7. *Norton v. Wilbur*, 5 Gray, 7. *Shea v. Lawrence*, 1 Allen, 167. *Kidney v. Richards*, 10 Allen, 419. *Richardson v. Lloyd*, 99 Mass. 475.

The proper evidence of the decision of the jury is the verdict returned by them upon oath and affirmed in open court; it is essential to the freedom and independence of their deliberations that their discussions in the jury room should be kept secret and inviolable; and to admit the testimony of jurors to what took place there would create distrust, embarrassment and uncertainty. Questions of the competency of such evidence have usually arisen upon its being offered with a view to overturn the verdict; for the party in whose favor the verdict has been rendered has ordinarily no need of further proof; but the decisive reasons for excluding the testimony of the jurors to the motives and influences

which affected their deliberations are equally strong, whether the evidence is offered to impeach or to support the verdict.

In England, the earlier authorities are not uniform; but we have not found any case since the beginning of this century in which, after the return and affirmance of a verdict in open court, the testimony of jurors to the motives and influences by which their deliberations were governed has been admitted. In *Owen v. Warburton*, 1 N. R. 326, upon a motion in the common pleas for a new trial, the affidavit of a juror was offered to prove that the verdict was decided by lot; and Sir James Mansfield, C. J., after advisement and conference with the judges of the other courts, said that they were all of opinion that, "considering the arts which might be used if a contrary rule were to prevail," "the affidavit of a jurymen cannot be received." In *Straker v. Graham*, 7 Dowl. 223, 225; *S. C.* 8 L. J. N. S. (Exch.) 86; Baron Alderson said, "It is entirely against public policy to allow a jurymen to make affidavit of anything that passes in agreeing to a verdict." And this statement was quoted with approval by Chief Justice Tindal in *Burgess v. Langley*, as reported in 1 D. & L. 21, 28. In *Roberts v. Hughes*, 7 M. & W. 399; *S. C.* 1 Dowl. N. S. 82; upon an offer, made in opposing a motion for a new trial, of a juror's affidavit to what had passed on the delivery of the verdict in open court, it was treated as a well settled rule "to exclude jurymen from swearing to what took place in their private room, or the grounds upon which they found their verdict." In *Raphael v. Bank of England*, 17 C. B. 161, 174, where the affidavits of jurymen were offered in support of a motion for a new trial, Mr. Justice Willes said, "If the affidavits are to be taken as a statement of something that passed in the jury room, they clearly are not admissible." In *Standewick v. Hopkins*, 14 L. J. (Q. B.) 16, Mr. Justice Patteson said, "The affidavits of jurymen cannot generally be read to support their verdict;" or, according to another report of the same case in 2 D. & L. 502, "The general rule is that the affidavits of jurors are not admissible either to support or to impugn their verdict."

In the earliest reported case in this Commonwealth, *Grinnell v. Phillips*, 1 Mass. 530, affidavits of jurors as to the manner in

which they arrived at a verdict were indeed admitted, by the opinion of two judges against one, in support of a motion for a new trial. But that case has been overruled by a series of later decisions.

In *Whitney v. Whitman*, 5 Mass. 405, when the jury retired to consider their verdict, a material paper, favorable to the party that prevailed, and which had not been put in evidence at the trial, was delivered with the other papers to the jury by mistake, and without fault of either party. Upon a motion for a new trial for this cause, each party summoned some of the jurors to prove whether they were influenced by the paper in finding their verdict. But, as the report states, "the court refused to examine any of the jurors; and observed that the court must be governed by the tendency of the paper apparent from the face of it; that it was not pretended that the jury had not read it, and it would be difficult for jurors, where, as in this case, there was much evidence of different kinds, clearly to decide in what manner their minds were influenced in forming their verdict. As it was received by the jury among other written evidence, and read by them, it must be presumed that they considered it as evidence, and gave due weight to it. The verdict was therefore set aside, and a new trial granted." So in *Hix v. Drury*, 5 Pick. 296, 302, the court observed: "Where a paper, which is capable of influencing the jury on the side of the prevailing party, goes to the jury by accident, and is read by them, the verdict will be set aside, although the jury say that they were not influenced by such paper, for it is impossible for them to say what effect it may have had on their minds."

In *Bridge v. Eggleston*, 14 Mass. 245, 248, "the court said that it had been expressly ruled, at a capital trial in Suffolk, that jurors should not be received to testify to the motives or inducements upon which they had joined in a verdict."

In *Hannum v. Belchertown*, 19 Pick. 311, which was an action against a town, under the St. of 1786, c. 81, § 7, to recover double damages for a defect in a highway, the defendants moved for a new trial upon the ground that the jury had doubled the damages, instead of leaving them to be doubled by the court and in

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proof of this offered the affidavits of the jurors. But the court, in the judgment delivered by Mr. Justice Morton, said: "We have received and have examined the depositions of all the jurors, and have come to the conclusion that they are inadmissible, but if admitted would show no sufficient cause for a new trial. The only point in which they all agree is, that they did not render a verdict for double damages. Nothing could better illustrate the wisdom of the rule, which holds the deliberations of the jury room to be inviolable, and precludes jurors from giving evidence of their own misconduct, of the reasons and grounds of their determinations, and the motives which governed their conduct. These are different in different jurors, some being influenced by one reason or motive, and others by different ones. If we required perfect unanimity in their reasoning as well as in the results, agreements would become as rare as disagreements now are. Men of strong minds and sound judgments, who are very sure to come to wise and just conclusions, would, if called upon to state the grounds of their opinions, often give very insufficient and unsatisfactory reasons for their decisions. The secrecy of the deliberations and discussions of the jury, and the exemption of jurors from the liability of being questioned as to their motives and grounds of action, are highly important to the freedom and independence of their decisions."

In *Cook v. Castner*, 9 Cush. 266, in which a new trial was moved for because one of the jurors had previously formed an opinion upon the case, and had stated it to the rest of the jurors in the jury room while they were deliberating upon their verdict, Chief Justice Shaw, in delivering judgment, said: "We think the judge was right in rejecting evidence of the alleged partiality and misconduct of a juror in the jury room, by the testimony of the juror himself or of the other jurors. It is a rule founded upon obvious considerations of public policy, and it is important that it should be adhered to, and not broken in upon to afford relief in supposed hard cases. A verdict, as the name imports, (*verdictum*), is taken in theory of law to be absolute truth, and it is important that it should be so regarded. All communications among the jurors are confidential; they are in-

tended to be secret, and it is best they should remain so. It is very probable, indeed it is almost inevitable, that many things should be said and views expressed, by individual jurors, which not only have no influence on others, but which they themselves do not ultimately adhere to and act upon."

In *Bridgewater v. Plymouth*, 97 Mass. 382, on a motion for a new trial, the testimony of two of the jurors was held inadmissible to show that they misunderstood the instructions of the judge and were induced by misapprehension to assent to the affirmance of the verdict in court; and Mr. Justice Foster, in delivering the opinion, said: "The time for objecting to the verdict as announced is when it is received and before it is recorded in open court. To admit afterwards a conflict of affidavits would be dangerous in the extreme, and lead to interminable controversy." See also *Murdock v. Sumner*, 22 Pick. 156; *Alcott v. Boston Steam Flour Mill Co.* 11 Cush. 91; *Folsom v. Manchester*, Ib. 334; *Boston & Worcester Railroad Co. v. Dana*, 1 Gray, 88; *Chadbourn v. Franklin*, 5 Gray, 312.

The jury may indeed, upon the return of the verdict, be inquired of by the court in its discretion, as to which of several grounds taken by the parties at the trial they based their verdict upon, or the rule by which they assessed damages. But in answering such inquiries, as was said by Mr. Justice Morton, "they act as jurors, and not as witnesses — under their official oath, not under an oath to testify." *Dorr v. Fenno*, 12 Pick. 521, 525. *Spoor v. Spooner*, 12 Met. 281.

In *Capen v. Stoughton*, 16 Gray, 364, after an order accepting the verdict of a sheriff's jury in favor of one party had been improvidently made by the court through mistake of counsel, and for that reason afterwards vacated, members of the jury were permitted to testify that the jury signed this verdict by mistake, after having agreed to a verdict for the other party and filling up a blank form accordingly. But that case, as was observed by Chief Justice Bigelow in delivering judgment, went upon the ground that it involved no inquiry into the conduct of the jurors during the progress of the trial, or the mode in which their verdict was arrived at or made up, but only a clerical error, by rea-

son of which the paper which they signed did not express the result upon which they had all agreed. And that verdict had been sealed up by the jury, and returned by the sheriff into court after they had separated, and never been affirmed in their presence, as to which the affidavits of jurors might with more reason be admitted than in the case of an ordinary verdict rendered in open court and affirmed and recorded in the presence of the jury. See *Bridgewater v. Plymouth*, 97 Mass. 882, 891; *Milsom v. Hayward*, 9 Price, 134; 1 Tidd Pract. (9th ed.) 582.

The report of *Ferrill v. Simpson*, 8 Pick. 359, upon which the defendant much relied, is very brief and unsatisfactory. So far as it bears upon this point, it merely states that upon a petition for a review of a real action the counsel for the respondent "produced one of the jurors to testify that a misapprehension at the trial in regard to a certain line had no influence upon the verdict;" and that "the court said that, as the petition was addressed to the discretion of the court, the evidence might be admitted. The juror was accordingly examined." Neither the nature of the mistake, nor its alleged bearing upon the case, nor the testimony given, is stated in the report. The only reason assigned for its admission—"as the petition was addressed to the discretion of the court"—implies that it was deemed inadmissible on any other ground; and is wholly unsound, for the admission and rejection of evidence upon the hearing of a petition for a review must be governed by the ordinary legal rules. *Richardson v. Lloyd*, 99 Mass. 475.

In *Tucker v. South Kingstown*, 5 R. I. 558, affidavits of jurymen as to what took place in the jury room and the grounds upon which they found their verdict were offered to impeach the verdict, and rejected; and no opinion was required by the case, or expressed by the court, as to the admissibility of such affidavits in support of the verdict.

In *United States v. Reid*, 12 How. 861, the affidavits of two jurors, offered in support of a motion for a new trial, stated that during the trial they read a report of the evidence in a newspaper, but that it did not influence their verdict. Chief Justice Taney, in delivering judgment, abstained from laying down any



general rule as to the reception of the affidavits of jurors. or examining the decisions upon the subject, because the court were of opinion "that the facts proved by the jurors, if proved by unquestioned testimony, would be no ground for a new trial. There was nothing in the newspapers calculated to influence their decision, and both of them swore that those papers had not the slightest influence upon their verdict." The court did not decide, but expressly declined deciding, whether the affidavits were or were not admissible. If they were rejected, the verdict of course stood. If the facts stated in them should be assumed as proved, there was nothing in them to impeach the verdict; and this, not merely because the jurors were not influenced, but also because there was nothing in the papers calculated to influence them.

It has long been settled law that the delivery of any paper by a party or his agent, designedly, and without the authority of the court, to the jury after they have retired to deliberate upon the case, will avoid a verdict in his favor, although the jury swear that they did not read it. *Co. Lit.* 227 *b.* *Heylor v. Hall*, *Palm.* 825; *S. C.* 2 *Rol. R.* 261. *Webb v. Taylor*, 2 *Rol. Ab.* 714, pl. 6; *S. C.* *Style*, 383; *Trials per Pais*, 224. *Richmond v. Wise*, 1 *Ventr.* 124, 125. And in *Hix v. Drury*, 5 *Pick.* 296, 302, this court accordingly said: "We are all of opinion that if a paper not in evidence is delivered to the jury by design, by the party in whose favor the verdict is returned, the verdict shall be set aside, even if the paper is immaterial; and this as a proper punishment for the party's misconduct."

But where evidence has been introduced tending to show that, without authority of law, but without any fault of either party or his agent, a paper was communicated to the jury, which might have influenced their minds, the testimony of the jurors is admissible to disprove that the paper was communicated to them, though not to show whether it did or did not influence their deliberations and decision. A jurymen may testify to any facts bearing upon the question of the existence of the disturbing influence, but he cannot be permitted to testify how far that influence operated upon his mind.

For example, in *Hix v. Drury*, just cited, where material papers, which had not been given in evidence at the trial, were delivered to the jury by accident, it was held that the affidavits of the jurors were admissible to prove that the papers were not read by the jury, because, as was said by the court, "where a paper which might influence the jury is not read, it is the same thing as if it had not been delivered to them." But, as has been stated in the earlier part of this opinion, it was also said in that case, and had been previously decided in *Whitney v. Whitman*, 5 Mass. 405, that, if the jury received and read the paper, they could not be permitted to testify upon the point whether it did or did not actually influence them. The same rule was laid down and acted on in the earlier cases in New Hampshire. *Page v. Wheeler*, 5 N. H. 91, 93. *State v. Hascall*, 6 N. H. 352, 361. In *State v. Hascall*, it was further held that the jurors could not be allowed to testify that "they were induced to agree to the verdict from a consideration of the law and evidence given at the trial, and from that only."

Upon the same principle, where the cause which is alleged to have prevented a fair trial is misconduct or partiality on the part of a juror, and testimony of his acts or declarations outside of the jury room has been introduced for that purpose, his testimony in direct denial or explanation of those facts is admissible. The statement of Mr. Justice Morton in *Dorr v. Fenno*, 12 Pick. 521, 525, that the testimony of jurors "may be received to explain or contradict other evidence tending to impeach their conduct," directly affirms this; but cannot, consistently with the judgments delivered by himself and other judges of this court in the cases already cited, be extended to allow the same or other jurors to testify to the part which they took, or the motives which influenced them, in their private deliberations.

In *McCorkle v. Binns*, 5 Binn. 340, where, upon a motion for a new trial after a verdict for the plaintiff in an action of libel, a witness testified to declarations, made by a juror before the trial, that he had made up his mind against the defendant and would find a verdict against him, the court permitted that juror to testify that he never made any such declarations; but would

not allow him to be asked "whether he had not been for the lowest damages of any of the jury;" the chief justice saying that "he thought it unnecessary in this case," and the other judges "that it was wrong, on principle, to inquire into the proceedings of the jury, by questions to the jurors themselves."

In *Ramadge v. Ryan*, 2 Moore & Scott, 421; *S. C.* 9 Bing. 388; upon a motion for a new trial, affidavits were produced that one of the jurors, on the day before the trial, had expressed his surprise at a verdict in a similar case, and said, "I shall be on the jury tomorrow, and I will take care that the verdict does not go that way." The court thereupon granted a rule to show cause, Chief Justice Tindal saying that the juror would "then have an opportunity of answering the matters with which he is now charged." The juror made an affidavit, denying the words alleged to have been used by him, which the court received, and on the strength of it refused a new trial. At the hearing upon the rule, the foreman of the jury also made an affidavit, stating that neither he nor any of the other jurors was influenced by anything which that juror said or did at the trial; but the court refused to receive it, and observed that those in support of the application referred only to the conduct of the juror before he entered the jury box.

In *Addison v. Williamson*, 5 Jur. 466, Baron Alderson permitted an affidavit of a juror, offered in support of the verdict, to be read so far as it contradicted his having made declarations attributed to him by affidavits of other persons, but excluded so much of it as stated other circumstances relating to the trial.

In *Standewick v. Hopkins*, 14 L. J. (Q. B.) 16; *S. C.* 2 D. & L. 502; *S. C. nom. Standerwicke v. Watkins*, 9 Jur. 161; where affidavits were filed imputing misconduct and gross partiality to several of the jurors; to meet which were offered their affidavits partly explaining and partly denying the charges; Mr. Justice Patteson said: "The affidavits of jurymen cannot generally be read to support their verdict; but here they are proposed to be used to answer affidavits casting imputations upon them; and when misconduct like this is charged against them, it would be contrary to natural justice not to allow them to make an answer."

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Woodward v. Leavitt.

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The contents of the affidavits on either side are not particularly stated in any of the reports. But that they did not relate to the deliberations in the jury room is manifest from the note of the first reporter, that "this is not inconsistent with the ruling of Rolle, C. J., in *Taylor v. Webb*, Trials per Pais, 224, that the affidavit of the jury ought not to be allowed to make good their verdict."

In *Haskell v. Becket*, 3 Greenl. 92, upon a petition for a review, the petitioner introduced evidence that one of the jurors had said before the trial that he had better settle the action, for he thought he would lose it. The juror, being called by the respondent, testified in direct explanation of these statements, and that he had not formed any opinion of his own upon the merits of the cause, and came to the trial without any bias or prejudice. "He also testified, as did another juror, that on going into their room the jury very soon agreed on a verdict for the defendant, and that he was one of the last to give his opinion." This last testimony does not appear to have been objected to, and is not noticed in the opinion of the court, who, in relation to the position of the petitioner that the juror had formed and expressed an opinion unfavorable to his cause, said: "But this is explained in a satisfactory manner by the juror himself, who is very properly called for that purpose. Indeed, whenever the verdict is impeached for any cause of this sort, the juror implicated ought to be permitted to explain." The subsequent decisions in *Taylor v. Greely*, 3 Greenl. 204, and *Sawyer v. Hopkins*, 22 Maine, 268, are to the same point exactly. Those of *Newell v. Ayer*, 32 Maine, 334; *Thrall v. Lincoln*, 28 Verm. 356; *Downer v. Baxter*, 30 Verm. 467; and *Bradford v. State*, 15 Ind. 347; go no farther.

In *Heffron v. Gallupe*, 55 Maine, 563, the court held that the testimony of a juror was admissible to facts touching his own conduct or acts when separated from his fellows, or the acts or declarations of other persons with or to him, but was inadmissible to what transpired in the deliberations of the jury, acting as an organized body, presided over by their foreman and performing their official duty.

In *Tenney v. Evans*, 13 N. H. 462, and several later cases in New Hampshire, the court has indeed gone so far as to admit, in order to disprove that a juror had formed an opinion, or was subject to bias or prejudice, the affidavits of the juror himself and his associates as to the part which he took in the discussions in the jury room; but has not assigned any satisfactory reasons for so doing. *State v. Howard*, 17 N. H. 171. *State v. Pike*, 20 N. H. 344. *State v. Ayer*, 3 Foster, 301. *Boynton v. Turnbull*, 45 N. H. 408. And in *Folsom v. Brawn*, 5 Foster, 114, the same court, in rejecting affidavits of jurors that they were under a misapprehension as to the effect of the verdict upon the costs, and would not have agreed to the verdict had they known the law on the subject, said: "Affidavits of jurors are not admissible to show their impressions as to the effect of their finding, or that they intended something different from what they found by their verdict. To allow affidavits of jurors for such purposes, or to show the consultations that took place in the jury room, and the motives, inducements or principles upon which the jury founded or joined in a verdict, would lead to great mischief. And this view of the matter is well sustained by authority."

The only other decision cited in the learned argument for the defendant, in support of the admission of the testimony of jurors to what took place during their deliberations in the jury room, is the *per curiam* opinion in *Dana v. Tucker*, 4 Johns. 487, by which, after an affidavit of the constable attending the jury, had been introduced, stating that the jurors agreed that each of them should mark down such sum as he thought fit to find, and, the sum total being divided by twelve, the quotient should be the verdict, and that the verdict was so ascertained, the supreme court of New York rejected similar affidavits of two of the jurors, but admitted the affidavits of two other jurors that after the jury had unanimously agreed to find a verdict for the plaintiff, and each juror had privately marked the sum he was inclined to give, and the sums so marked had been added together and the amount divided by twelve, the jury agreed that the sum which had been thus produced should be their verdict. That decision can hardly be reconciled with the later cases in this Commonwealth and in

England. But the affidavits there admitted were in direct contradiction of the testimony offered to impeach the verdict, and related to the action of the whole jury, and not to the part taken by individual jurors in their deliberations. And the decision would seem to be limited accordingly by the judgment of the same court in *Brownell v. McEwen*, 5 Denio, 367, excluding affidavits of particular jurors offered to show that they agreed to the verdict rendered, on the supposition and under the impression that it would settle another cause of action beside that on which the suit was brought; and declaring that to allow a juror to disclose what influence operated upon his own mind, to induce him to assent to the verdict which he joined in rendering, was not warranted by any of the cases on the subject, and could not be tolerated.

Upon a consideration of the whole matter, our conclusion is, that the testimony of the jurymen Brown in explanation of the facts and statements relied on to prove that he had formed and expressed such an opinion as was attributed to him, was rightly admitted, as directly tending to meet and explain the testimony introduced by the plaintiff, and not concerning anything that passed in the jury room; but that the testimony of Brown and other jurors as to the part which he took in the discussions and votes of the jury was incompetent and should have been excluded, because it related to the private deliberations of the jury, and had no tendency to disprove that he had previously expressed and still entertained an opinion inconsistent with an impartial discharge of his duty.

As it does not appear that the new trial was denied upon the ground that, independently of this testimony, the judge was not satisfied of the existence of opinion or prejudice on the part of this juror, or upon the ground that the plaintiff had been unreasonably negligent in raising the objection to his qualifications, the exception to the admission of the incompetent evidence must be sustained, and the case stand in the superior court for a

*Rehearing of the motion for a new trial.*

### HENRY JOHNSON & another vs. HOLYOKE WATER POWER COMPANY.

In a case referred to three arbitrators, one party, without the knowledge of the other, wrote a letter concerning its merits to one of the three, who received it after they had finally decided the case and when nothing remained to be done but the formal drawing up and signing of their award, which required no further meeting or consultation. *Held*, that this afforded no ground for setting aside the award, which was thereupon drawn up, signed and returned in accordance with such previous decision and without the other two arbitrators knowing of the existence of the letter.

CONTRACT by Henry Johnson and Alvin A. Long on an account annexed for lumber sold and delivered by the plaintiffs to the defendants. The answer denied that the plaintiffs delivered the full quantity of lumber which they alleged. The case was referred by a rule of the superior court to three arbitrators, "the report of whom or a majority of whom to be made as soon as may be and judgment thereon to be final;" and at August term 1871 they returned a unanimous award, dated August 22, 1871, that they had met the parties and heard their proofs on the 16th, 17th and 18th of August, and that the plaintiffs were entitled to recover of the defendants \$5940.65 and costs. The plaintiffs moved that the award be accepted and confirmed; but the defendants objected to its acceptance, and moved that it be set aside, "because the plaintiff Long tampered or attempted to tamper with one of the referees after the case was submitted and before the referees had closed their deliberations and signed their award;" and the following facts were agreed upon these motions, the court thereupon to "pass such order or orders upon the motion of the plaintiffs, as the law requires:"

On August 23, 1871, William Allen, the chairman of the arbitrators, addressed to the clerk of the superior court a communication covering, "for the inspection of the counsel in the case, and subject to the order of the court," a letter written to him by Long, and making the following statement in respect thereto: "The letter was received by me on Monday evening, the 21st instant. The cases were considered and decided by the referees on Saturday, the 19th instant, but the awards were not drawn up

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Johnson v. Holyoke Water Power Company.

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and signed until Tuesday the 22d instant, when the awards were made out in conformity with the decisions made on Saturday. The existence of this letter was not known to the other referees than myself, before the awards were signed. I leave this statement with you for the use of the parties if they desire it."

Long's letter was dated at Northfield August 20, 1869, [1871 ?] and addressed to "Mr. Alen," and all but the formal parts thereof were as follows: "I wish to know if I have any hold on Chase for taking a false oath on my case respecting my Book you look your minutes over and write me if I have a hold on Chase I want you and Charles Alen to help me keep your papers safe. but the worst and blackest lie he told was at Newbry in Sawyers house when wee made the trade that was what he wrote in his Book that was awful for any man that holds his position in the world. yours truly. Alvin A. Long. let this letter have no affect on your decision on neather case nor dont let the other two see it I am goin to Boston Mondy on business I see Mr Alen."

It was agreed that the statements in the communication of the chairman of the arbitrators to the clerk were true, and that "the defendants' counsel knew of the existence of Long's letter and read it before the award was opened, and raised no objection to the court at that time, and afterwards consented to the opening of the award and were present when it was opened."

Upon these facts the superior court ordered the acceptance of the award, and the defendants appealed.

*C. Allen & S. O. Lamb*, for the plaintiffs.

*N. A. Leonard & G. Wells*, for the defendants.

GRAY, J.\* We have no doubt that any communication made by one party to a submission, without the knowledge of the other, while the arbitrators have the case under consideration, attempting to influence them in his own favor, or to prejudice them against the other party, will avoid the award, if seasonably objected to by the latter; because the court cannot know that it did not affect the minds of the arbitrators, and must protect the inno-

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\* The chief justice did not sit in this case, and it and the case following were submitted upon written arguments in the ensuing vacation.



cent party from the possibility of being injured by the unlawful attempt of the other party. If such an attempt is made before the award is returned or published, it is ordinarily impossible to ascertain that it did not have any effect. But in the present case that difficulty is removed by the agreement of the parties that the statements of the chairman of the arbitrators shall be taken to be true; for by those statements it appears that the letter written by one of the plaintiffs was received by him after the case had been considered and finally decided by the arbitrators, and when nothing remained to be done but the formal drawing up and signing of the award, which required no further meeting or consultation between them; that the award was afterwards drawn up in accordance with such previous decision; and that even the existence of the letter was not known to the other arbitrators before the award was signed. These facts being admitted, there is no ground for apprehension that the irregularity on the part of the plaintiffs may have injured the defendants.

*Judgment, accepting the award, affirmed.*

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**CHESTER C. CONANT, judge of probate, vs. HORACE H. STRATTON & others.**

After judgment for the plaintiff in an action brought by a legatee in the name of the judge of probate on a bond given by the executor under the Gen. Sts. c. 93, § 3, it is too late for the defendant to object that the action could not be maintained for want of a previous demand on him for the legacy.

Under a bequest to the testator's widow of "ten dollars per year for spending money, if she should need it and call for it, to be paid to her by the executor," her call for the money is conclusive of her need of it, and by omitting to call during any one year she does not forfeit the right to take payment for that year afterwards.

A bequest to the testator's widow of "a good and comfortable support and maintenance, both as to food, clothing and nursing in health and sickness at his house," includes a proper supply of fuel, and the necessary expenses of keeping the house in tenantable and comfortable condition.

The fact that a testator's widow owns a small amount of property in her own right is immaterial in determining what is due under his bequest to her of "a good and comfortable support and maintenance, both as to food, clothing and nursing in health and sickness at his house."

In assessing damages for the breach of an executor's obligation to provide "a good and comfortable support and maintenance" for a legatee "as to clothing," the allowance of clothing due to the legatee may be computed at an annual sum.

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Conant v. Stratton.

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In assessing damages for the plaintiff in an action brought in the name of the judge of probate by a testator's widow for a breach of a bond given by the executor under the Gen. Sts. c. 93, § 3, consisting in his refusal to fulfil a legacy of a comfortable support and maintenance to her at the testator's house, a sum may be included for her discomfort and inconvenience through the defendant's neglect to keep the house in repair, and also whatever amount is needful to make it habitable and comfortable.

Upon a judgment for the plaintiff in an action brought in the name of the judge of probate on a bond given by an executor under the Gen. Sts. c. 93, § 3, for the executor's neglect to pay a legacy, damages are to be assessed, and execution is to issue, for the amount due upon the legacy to the date of judgment, without reference to the amount of the estate in the executor's hands.

CONTRACT, brought March 29, 1870, upon a bond given May 2, 1867, by Horace H. Stratton, with the other defendants as sureties, under the Gen. Sts. c. 93, § 3, in the penal sum of \$2000, conditioned that he, being executor and residuary legatee of his father, Samuel Stratton, late of Gill, deceased, should pay all the debts and legacies of the testator.

By the will, which was set forth in the declaration, the testator bequeathed to his wife, Sarah Stratton, the furniture which she brought to him at the time of their marriage, and "a good and comfortable support and maintenance, both as to food, clothing and nursing in health and sickness at my house in Gill, where I now live, and to be furnished to her by my executor hereinafter named, at his expense, during her natural life and so long as she remains my widow," and also "ten dollars per year for spending money, if she should need it and call for it, to be paid to her by my executor hereinafter named, so long as she remains my widow." He then made bequests and provisions for the benefit of his daughter Mehitable and others of his children, and among other things gave Mehitable \$500 and "a right to have a home in my house, where I live, so long as she remains unmarried, and the right to use and occupy such parts of my house as she may find necessary and convenient, while she remains unmarried, and she and my said wife may occupy said house together or in such proportions as they may agree upon." And finally he appointed Horace H. Stratton executor; and gave him all the residue of the estate, "on condition that he pays the legacies hereinbefore named to my other children, and maintains and supports my present wife, as hereinbefore provided for her, and relinquishes all claims for his labor and services heretofore and hereafter for me, and also

relinquishes all claims against my estate for a certain note of hand which I have given him for the sum of about \$800."

The alleged breach of the bond was, that Horace H. Stratton, "though requested, has not furnished the said Sarah Stratton a good and comfortable support and maintenance; that he has neglected and refused to furnish said Sarah with suitable firewood, clothing, food and lights; that he refuses to keep the house mentioned in said will in reasonable repair and condition for the use and occupation of said Sarah, and refuses to permit her to occupy said house; and that he also refuses to said Sarah the sum of ten dollars a year for spending money, though she has needed and called for the same." And the declaration alleged that "the said Sarah, being aggrieved by the neglect and default of said Horace H. Stratton, applied for and obtained leave to bring a suit upon the aforesaid bond, and so the plaintiff says that an action has accrued to him in his said capacity" of judge of probate, "to recover of said defendants any and all damages sustained by reason of the aforesaid neglect and default of said Horace H. Stratton, executor as aforesaid."

The answer denied that Horace H. Stratton had failed to furnish Sarah Stratton with a good and comfortable support and maintenance; denied that he was under any obligation to supply her with firewood or lights, but alleged that he had nevertheless furnished wood enough for her use; denied that he ever failed to furnish her with necessary food and clothing "so far as he could;" denied that the house was in a condition unsuitable for her use and occupation, or that he ever refused to permit her to occupy it; and denied that he had refused the spending money provided for her by the will, but alleged that, if he had, it was because she never called for it and did not need it, having a large estate of her own. Finally the answer alleged "that the estate of Samuel Stratton has been long since exhausted in the payment of debts and expenses of administration, and the provisions of his will in regard to the support of his wife Sarah cannot be fulfilled for any time hereafter, because there is no estate or property left for that purpose, and the defendants deny that they are under any obligation to furnish any further support for the said Sarah, she well knowing the premises."

The case was submitted to the determination of the court without a jury, under an agreement of the parties that if judgment should be given for the plaintiff an assessor should be appointed to ascertain the sum for which execution should issue; and at April term 1871 *Colt, J.*, gave judgment for the plaintiff and referred the case to an assessor, the following are the material parts of whose report :

" On the hearing, at the outset, the question arose upon what rule the damages were to be assessed. The plaintiff contended that the true rule was the amount of estate received by the defendant as executor and residuary legatee, less the legacies, debts and such other charges as were lawful claims under the will against the executor, so far as the executor should show that he had paid the same. The defendant contended that the execution should issue only for that actual damage which it might be proved that the widow, for whose benefit the action is brought, had suffered from the non-fulfilment of any of the provisions for her benefit in the will. I therefore heard all the evidence produced as proof of damage under both rules suggested, and report my finding in two forms :

" First. I find that the executor and residuary legatee received an estate of the value of \$5979.88 ; and that out of this estate he has paid two sums, viz : legacy of Mehitable, \$500 ; one half of a mortgage on part of the property owned in common with the executor, \$250. Although the hearing was adjourned over one day to enable the executor to be prepared with his statement of account, no further evidence of payment by him was offered. I therefore find that out of the estate received by him there remains unaccounted for, in money value, the sum of \$5220.88 ; and if this is the true rule of damage in this case, (which question is submitted to the court,) I find that execution should issue for that sum.

" Second. Assessing the damage or sum for which the execution should issue on the principle that the true measure is what the widow has sustained of actual damage from the non-fulfilment of his obligations by the executor, I find the items as follows :

" 1. Under the provision of the will as to spending money, I treat the provision as calling for an annual payment. Prior to the judgment in the case, three full years had elapsed ; and I find that in the judgment of the widow she needed such spending money, and that demand was made by her on the executor for the allowance for three years, and I assess the amount due as spending money at \$30.

" 2. I find the money equivalent for the provision for clothing to be \$50 per annum ; and I assess the damages sustained by the widow from the non-performance of the executor in this particular (calculated to the time of judgment in this suit, at \$50 per annum for three years and ten months, to be \$191.66, less the amount furnished in that time, viz. \$8.75) at \$182.91.

" 3. I find that the executor has neglected to furnish any firewood to the widow for two and a half years up to the time of judgment in the action, and assess the damage at five cords a year at \$8 per cord, or in gross \$100.

" 4. I find that, from August 1869 to the time of the judgment in the action, the executor has failed to furnish any provisions to the widow for ninety-four weeks ; and I find \$3.25 to be a reasonable sum per week to supply her with provisions at her house in Gill, to be cooked by herself ; and therefore I assess her damage in this particular at \$305.50.

" 5. I find that the house where, under the will, the widow was to live and receive her support, has been suffered by the executor to be in an almost ruinous state, without any repairs ; that it has not been comfortable at any time since a period shortly subsequent to the testator's decease ; and that during the latter part of the time only one room has been in a living or habitable condition. In assessing damage in this particular, I find as follows: For the discomfort and inconvenience suffered from leakage and other dilapidation, \$100 ; and for the amount necessary to repair the house so as to put it in comfortable and habitable condition, \$275.

" In assessing each and all the above items, I declined to consider the admitted fact, that the widow was possessed of a sole and separate property of \$700 in money ; and I required no evi-

dence in regard to the first item, that it was at any time necessary, except in her own judgment, that she should have spending money, holding that the executor could not be the judge of a necessity in the case and was obliged to pay the money if called for by the widow. I was also requested by the defendants to rule that there was no default in regard to any of the provisions of the will, on the part of the executor, until demand by the widow. In view of the provisions of the will I declined so to hold, but I nevertheless find that there were parol demands made on the executor by the widow, both before and after written demands annexed to this report. I was also requested by the defendants to rule that no damages could be recovered after the date of the suit. I declined so to hold, and have assessed damages in the manner above stated to the date of the judgment. I was also requested by the defendants to rule that if the widow did not call for the spending money each year she would waive her right to it. This I declined to rule, but found the fact as above stated. I was also requested by the defendants to rule that the words "good and comfortable support" in the will do not include firewood, lights and repairs. This I declined to hold. By an understanding between the parties and the assessor, all rights of parties to object to the rule as to the measure of damages on any item of damage above recited are saved.

"If therefore the true rule for assessing the sum, for which execution should issue, is what actual damage the widow has sustained from the non-performance of his obligations by the executor, I assess said sum, according to the above items, at \$998.41, to the date of the judgment."

The written demands annexed to the report were three letters addressed by the widow to the executor under dates respectively of July 1869, August 30, 1870, and January 15, 1871. In the first, she requested him to pay her twenty dollars "agreeably to the will." In the second, she requested him to pay her ten dollars agreeably to the will, and stated that she needed the money. In the third, she requested him to pay her ten dollars agreeably to the will, and gave him notice that she needed four or five cords of wood, cut and prepared for the stove, also twelve yards of cot-

ton cloth, and ten yards of black alpaca cloth for a dress, with thread and silk to make it.

The case was heard by the chief justice and reserved for the determination of the full court upon the questions reported by the assessor.

A. *Brainard*, for the defendants. The condition of the bond was, that the executor should pay the testator's debts and legacies. His obligation to do so being absolute, the amount of the estate which came to his hands affords no measure of his liability for a breach of it, and is immaterial in the computation of damages. *Jones v. Richardson*, 5 Met. 247. The second rule stated in the assessor's report is the true one, that execution should issue for such damages only as it is proved that the widow actually suffered by the executor's default.

The assessor's findings and rulings upon the items of the \$993.41, which he has computed under this rule, are erroneous in many particulars.

1. As to the spending money. The allowance of it to the widow by the testator was conditioned on her "needs," not her "wishes." If she is to be the judge of her needs, the two words are confounded. And if she is not to be the judge of them, the executor must be, subject to the oversight of the probate court.

The allowance was a yearly one. Her right to call for it for any one year ceased with the year.

2. It was erroneous to assume that an annual provision of clothing was due to the widow. The executor's duty to provide depended on her need. If she was already largely provided with clothing when the testator died, she may not have needed any more than he has furnished her with. He was not bound to furnish her with clothing or anything else, till she demanded it and specified the articles she needed. *Prescott v. Parker*, 14 Mass. 428. *Miles v. Boyden*, 8 Pick. 213. *White v. Webster*, 13 Pick. 374.

3. In the provision "of a good and comfortable support and maintenance both as to food, clothing and nursing," the last part of the clause limits the first part, and excludes any obligation to furnish fuel. The testator did not intend to make provision for

her entire support. He knew that she had means of her own. *Dawes v. Swan*, 4 Mass. 208, 215. *Braman v. Stiles*, 2 Pick. 460, 463.

4. The defendants do not object to the finding as to the food, except on the ground that the allowance is excessive in amount.

5. As to the allowance for the widow's discomfort and inconvenience from the dilapidated condition of the testator's house, it is to be observed that the use and occupation of the house are not expressly or exclusively given by the will to the widow; that no provision is made in the will for repairs; and that it does not appear that the house is or ever has been worth repairing since the testator's death. These considerations apply also to the allowance for repairs; and the defendants further object, in respect to that item, that it is beyond the jurisdiction of the court to require the executor to pay a gross sum to another person in advance for repairs, without reserving to the executor any power to compel or supervise its application.

6. No damages can be recovered since the date of the writ.

*S. O. Lamb*, for the plaintiff. Under the Gen. Sts. c. 101, § 28, cl. 4, the plaintiff is entitled to execution for \$6214.29, — \$5220.88 as the value of the estate of the deceased in the executor's hands for which he does not account, and \$993.41 for damages occasioned by his neglect and maladministration.

The assessor's findings and rulings upon the items which compose the \$993.41 are all correct.

1. As to the spending money. By the terms of the bequest, that the widow should have it "if she should need it and call for it," no power of revision of her own judgment of her need is given to the executor. The expression of her wish for the money at any time is conclusive of her need of it, in the sense of the word "need" in this connection.

2. As to clothing. The terms of the bequest impose the duty on the executor to furnish her with suitable clothing at his own expense; and the judgment in the action and the findings of the assessor are conclusive that he neglected and refused to do so. It is immaterial that she had some means of her own, out of which she could make temporary provision for herself during his



default. The allowance made by the assessor is reasonable. Fifty dollars a year for dressing a modern woman is moderate enough.

8. As to firewood. Fuel was certainly necessary to cook the widow's food, and warm her dwelling; and without cooked victuals and a warm room she could not have "a good and comfortable support" as to either food or nursing.

4. The allowance for food is reasonable.

5. The provisions of the will concerning the use and occupation of the house, by the widow and the testator's daughter Mehitabel, are plain to the effect that he meant that his widow should enjoy a home there substantially as she had enjoyed it in his lifetime. *Whiting v. Whiting*, 15 Gray, 503. And on this construction of them the executor was bound to keep the house habitable and comfortable at his own expense, and is liable for the damage occasioned by his neglect of duty.

To the objection that the executor should not be compelled to pay money for repairs, with no power reserved to him to compel or supervise its application, it is sufficient to reply that the sum is not to be paid to the widow, but to the judge of probate, to be applied according to law to carry into effect the provisions of the will.

6. Damages were properly assessed to the date of the judgment. *Waldo v. Fobes*, 1 Mass. 10.

AMES, J. The only question to be disposed of in this case is as to the amount for which execution ought to issue, upon the judgment which has been rendered in favor of the plaintiff. The suit is founded upon the executor's bond, given for the payment of the debts and legacies of the testator, in pursuance of the Gen. Sts. c. 93, § 8; and the breach of the bond charged against the executor is his neglect or refusal to pay the legacy given by the will to the testator's widow. The declaration alleges that she applied to the plaintiff for leave to bring this action in his name; that such leave was granted; and that the action is accordingly brought to recover damages "for the aforesaid neglect and default" of the executor. The defendants in their answer denied that there had been any breach of the condition of the bond

and insisted that the executor had fully administered the estate. Upon the trial of this issue, judgment was rendered for the plaintiff, and the case was committed to an assessor, to determine the amount for which execution should issue. The question now to be disposed of is raised by his report.

At this stage of the case, it is manifestly too late to call in question the right of the plaintiff to maintain this action. If under any circumstances an action upon the executor's bond for the payment of debts and legacies can be maintained in the name of the judge of probate for the benefit of a single legatee, we must assume either that the needful circumstances existed in this case, or that the want or absence of any of them was waived by the defendants. It is well settled that the giving of such a bond is an admission of sufficient assets, and the failure to pay a legacy on demand, when it is due, is a breach of the condition. *Jones v. Richardson*, 5 Met. 247. There being a breach of the bond, a suit in the name of the judge of probate will lie; and when such action can be maintained for the benefit of a legatee, the execution should issue for the amount of the legacy and interest. *Fay v. Taylor*, 2 Gray, 154. The bond is taken expressly for the security of a legatee, and upon proper demand suit upon the bond may be brought for his benefit. *Prescott v. Parker*, 14 Mass. 428. In *Paine v. Gill*, 13 Mass. 365, it was settled that after the judge of probate has obtained judgment on the bond for a breach of the condition the court might award execution to any one who should satisfactorily prove that he was entitled to an indemnity out of the condition of the bond. The statute provides that if the executor should commit a new breach of the condition of the bond, or if a creditor, next of kin, legatee or other person interested has a claim for further damages, on account of any neglect or maladministration of the executor, a writ of *scire facias* may issue on the original judgment, and a new execution may be awarded in like manner as might have been done in the original suit. Gen. Sts. c. 101, § 80. In *Fay v. Taylor* it does not appear to have been considered a necessary preliminary to such an action, that judgment should have been rendered in favor of the legatee, against the executor, for the amount of the legacy. In that

case the amount of the legacy was not a matter of controversy. Whether the executor in the present case could have successfully resisted the plaintiff's claim, on the ground that the legacy is not for a definite and specific sum, and that it should first have been made the subject of a suit against the executor and reduced to a judgment against him in favor of the legatee herself, is a question which does not arise upon these pleadings. It is too late for him, in the present position of the case, to resort to any such defence. We cannot doubt therefore that the execution may properly issue for the amount due to the widow, in this case, upon her legacy. *Richardson v. Oakman*, 15 Gray, 57. The auditor's construction of the bequest to her, and his award and rulings as to the actual damage which she has sustained from the non-fulfilment of his obligations by the executor, appear to us to be correct both in principle and detail. The bequest of a good and comfortable support and maintenance, as to food, clothing and nursing, in health and in sickness, at the testator's house, to be furnished by the executor at his expense, plainly includes a proper supply of fuel, and the necessary expense of keeping the house in a tenantable and comfortable condition. Upon his refusal to execute the trust imposed upon him by the terms of this bequest, he may rightfully be compelled to furnish her with the funds necessary to enable her to obtain and enjoy the bounty intended by the testator, and to indemnify her for all damages occasioned by such refusal.

The only serious doubt in the case arises from the provisions of the fourth clause of § 28, which seem to import that the execution to be issued under that section should be for the entire amount of all the estate remaining in the executor's hands. It appears to us, however, that these provisions do not apply to the present case, but are rather intended for the case of the removal of an unfaithful executor from his trust, and the substitution of another in his stead. *Bennett v. Russell*, 2 Allen, 537. The suit provided for in that clause is in the name of the judge of probate; but he is a formal and official party only. He can in no case receive the money, or the proceeds of the suit, himself, and has no authority to direct their appropriation or distribution. On the

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*Conant v. Stratton.*

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contrary, they are to be paid to a rightful administrator, and would be assets in his hands to be administered according to law. *Newcomb v. Williams*, 9 Met. 525. It is manifest that such a suit would not directly result in a decree in favor of a legatee or creditor whose rights had been disregarded, and would not furnish a convenient or appropriate remedy for a wrong of that kind.

Our conclusion therefore is, that execution should issue upon the judgment for the amount due upon the legacy as found by the assessor, namely, \$993.41, with interest and costs.

*Ordered accordingly.*

**CASES**  
**ARGUED AND DETERMINED**  
**IN THE**  
**SUPREME JUDICIAL COURT**  
**FOR THE**  
**COUNTY OF HAMPDEN, SEPTEMBER TERM 1871,**  
**AT SPRINGFIELD.**

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**PRESENT :**

<b>HON. REUBEN A. CHAPMAN,</b>	<b>CHIEF JUSTICE.</b>
<b>HON. HORACE GRAY, JR.,</b>	<b>} JUSTICES.</b>
<b>HON. SETH AMES,</b>	
<b>HON. MARCUS MORTON,</b>	

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**COMMONWEALTH vs. FREDERICK WHITCOMB.**

**An indictment will lie on the Gen. Sta. c. 161, § 54, for obtaining money as a charitable gift by false pretences.**

**CHAPMAN, C. J.** By the Gen. Sta. c. 161, § 54, whoever "designedly, by a false pretence or by a privy or false token, and with intent to defraud, obtains from another person any property," &c., "shall be punished," &c. The defendant falsely pretended to the Reverend Mr. Peck, a Methodist clergyman, that he was himself a Methodist clergyman, and pastor of a Methodist church in Waterville, Kansas, and that on the preceding Lord's day he had preached in the church of the Reverend Charles Fowler, of Chicago; that he was poor, penniless and utterly destitute, and had that day been robbed of all his money; and he thereby obtained of Mr. Peck six dollars as a charity. He afterwards

admitted that these representations were false. His only defence is, that the statute does not include cases where the money is parted with as a charitable donation.

But it is obvious that the case comes within the words of the statute. It comes also within the reason of the statute. There is as much reason for protecting persons who part with their money from motives of benevolence, as those who part with it from motives of self-interest. The law favors charity as well as trade, and should protect the one as well as the other from imposture by means of false pretences. Obtaining money by means of letters begging for charity on false pretences is held to be within the English statute, (7 & 8 Geo. IV. c. 29, § 58,) which is quite similar to ours. *Regina v. Jones*, 1 Denison, 551. *Regina v. Hensler*, 11 Cox Crim. Cas. 570.

A contrary doctrine has been held in New York. *People v. Clough*, 17 Wend. 851. The court admitted that the crime was of a dark moral grade, and was within the words of the statute of New York, which was copied from the English statute of 80 Geo. II. c. 24. They adopted that construction chiefly on the ground that the preamble to the statute referred to trade and credit. But our statute, like the existing English statute, refers to no such matter, and is not restricted by any preamble.

*Exceptions overruled.*

*J. E. McIntire*, for the defendant.

*C. Allen*, Attorney General, for the Commonwealth.

### COMMONWEALTH vs. SIMON PIERCE.

At the trial of an indictment for maintaining "a building, place and tenement" for the illegal keeping and sale of intoxicating liquors, it appeared that the defendant kept a saloon containing a bar and liquors, situated "in a large block." Held, that evidence that liquor was found in the cellar "under the building" was admissible, although there was no evidence that the cellar was connected with the saloon.

INDICTMENT for maintaining "a certain building, place and tenement" in Springfield, for the illegal keeping and sale of intoxicating liquors.

At the trial in the superior court, before *Brigham*, C. J., there was evidence that the defendant kept a saloon containing a bar, intoxicating liquors and implements of traffic in intoxicating liquors, situated "in a large block;" that he occupied rooms over the saloon as a boarding-house; and that liquors were found in a cellar "under the building," but there was no evidence that the cellar was in any way connected with the saloon, otherwise than that it was "under the building."

The defendant requested the judge to rule that the evidence of what was found in the cellar could not be considered against him. The judge refused so to rule, and the whole evidence went to the jury under instructions as to what constituted a tenement, to which no objection was taken. The defendant was convicted, and alleged exceptions.

*G. M. Stearns & M. P. Knowlton*, for the defendant.

*C. Allen*, Attorney General, for the Commonwealth.

BY THE COURT. The evidence was admissible, and was properly submitted to the jury. *Exceptions overruled.*

### COMMONWEALTH vs. JOHN JENNINGS.

When a party introduces evidence of a quarrel between himself and a witness, for the purpose of affecting the credit of the latter, it is within the discretion of the presiding judge how far to allow the other party to show the nature and particulars of the quarrel.

On an issue whether a person was the keeper of a tenement which was used for the illegal sale of intoxicating liquors, evidence is admissible that kegs found in the tenement were attached tags bearing his initials and the name of an express company; that barrels of liquor bearing his name or initials arrived at a freight-house, and were, in part or in whole, taken off upon vehicles running to the tenement; and that he requested a witness to say nothing about his having liquor come there.

The mere fact that a witness at a trial was allowed to give his opinion of the meaning of initials marked on a barrel affords no ground for sustaining a bill of exceptions which does not show that such testimony was incompetent or was material.

On an indictment for the illegal keeping of a tenement for the sale of intoxicating liquors, the judge instructed the jury that if the defendant was interested in the profits of the business, or was a partner, he could be held; that if another person was the sole owner in fact, the defendant must be acquitted; and that if the jury entertained a reasonable doubt as to who was the proprietor, or that the defendant was such, they must acquit. *Held*, that the defendant had no ground of exception.

INDICTMENT found at December term 1870 of the superior court, for keeping and maintaining a tenement in Springfield for the illegal sale and keeping of intoxicating liquors between June 1, 1870, and the day of the finding of the indictment.

At the trial before *Brigham*, C. J., the defendant admitted that the tenement was so kept and maintained, but contended that before June 1, 1870, he sold out to Morris O. Connor all interest in the business there carried on, and that he had no interest in or control of the premises and business since that time.

Sebeas C. Couch and Hannibal H. Billings, both deputies of the constable of the Commonwealth, were witnesses for the Commonwealth. The defendant, on cross-examination, asked Couch, who testified after Billings, if Billings had not had trouble and angry conversation with the defendant; and Couch replied that such was the fact. Upon re-examination, the district attorney asked what the difficulty was between the defendant and Billings, the defendant objected to the question, but the judge ruled that it was competent to ascertain the extent of the ill will which the trouble would occasion; and Couch thereupon testified "that he and Billings made a seizure at the tenement in question in March 1870; that the defendant came to their office the next day and said that if he had been there when they made the seizure they would have made it over his dead body; and that other hard talk passed between the parties."

Couch further testified without objection that he made a seizure at the tenement in October 1870, when the defendant was not present; and that some kegs stood near the door, with bright and fresh express tags attached to them. The district attorney asked how the kegs came there, and the witness said he did not know, except what the tags said. The district attorney asked what was on the tags, and the defendant objected. The judge overruled the objection, and admitted the evidence to show that the tenement was kept and used by the defendant at the time alleged in the indictment; and the witness answered that the tags were marked "J. J.," and also with the name of the express from Ware. No further evidence was given as to these tags; and all the testimony in relation to them was excepted to by the defendant.



Elisha C. Pettis, a witness called by the Commonwealth, was allowed, against the objection of the defendant, to testify as follows: "In the summer of 1870, since June 1, the defendant said he did not wish me to say anything about his having liquor coming there. In one or two instances, iron-bound barrels and half barrels of liquors have come to the freight-house of the Boston & Albany Railroad at Springfield, marked in the defendant's own name. The team that runs to the tenement drew them away. Other barrels have come to the freight-house, marked "J. T. & Co." and "J. J." underneath. I suppose "J. T. & Co." means John Tracy & Company, of Albany."

The judge instructed the jury, among other things not now material, that "if the defendant was interested in the profits of the business, or was a partner, he could be held under this indictment; that if Connor was the sole owner in fact, the defendant must be acquitted; and that if the jury entertained a reasonable doubt as to who was the proprietor, or that the defendant was such, they must acquit." The defendant was convicted, and alleged exceptions.

*G. M. Stearns, (M. P. Knowlton with him,) for the defendant.*

1. Although personal controversy may be shown, particulars cannot be inquired into; to do so would lead to the trial of numerous collateral issues.

2. The writing on the tags should not have been admitted; it was admitting evidence of the doings of the Ware Express Company, which were *res inter alios*.

3. The testimony of Pettis was inadmissible. The fact that barrels of liquor came to the freight-house, marked with the defendant's name, and were drawn to the tenement in question, had no tendency to prove that the defendant kept the tenement. His knowledge was not shown. The evidence as to the other barrels was even more objectionable. The opinion of the witness that "J. T. & Co." meant John Tracy & Company was not competent. The witness could not give his opinion that the barrels came from a noted liquor firm in Albany.

4. The judge instructed the jury that if "the defendant was interested in the profits of the business, or was a partner," he was

guilty ; but the defendant might be interested in the profits as a compensation for doing some lawful business for Connor, and yet not be a partner, nor a keeper of the tenement.

*C. Allen*, Attorney General, for the Commonwealth.

MORTON, J. 1. The defendant offered evidence to show that there had been an angry controversy between him and Billings, one of the witnesses for the government. The purpose was to affect the credit of Billings. It was competent for the government to show what the nature of the controversy was, so that the jury might judge how far it would bias the witness and affect his credit. The extent to which such inquiry shall be carried is within the discretion of the presiding judge.

2. The testimony as to the tags was admissible. It constituted a part of the description of the kegs found at the tenement in question, and in connection with the evidence of the defendant's continued presence there, and acts of control, had some tendency to show that he was still keeping the tenement. It was for the jury to say whether the kegs were thus marked with his knowledge.

3. The testimony of Pettis was admissible. The facts that barrels of liquor, marked with the defendant's name or initials, arrived at the depot, and were, in part or in whole, taken off by teams running to this tenement, if known to the defendant, were competent to show that he still kept the place ; and the request of the defendant to the witness not to say anything about his having liquors coming there, and the other evidence in the case, would authorize the jury to find that he knew that the barrels were thus marked. The statement of the witness that he supposed the mark "J. T. & Co." meant John Tracy & Company of Albany, furnishes no ground for a new trial. If the witness knew, by the admission of the defendant or otherwise, that the initials were those of John Tracy & Company, the evidence was competent. It does not appear that he had not such knowledge. Nor does it appear that John Tracy & Company were, as is now claimed, "a noted liquor firm in Albany." The bill of exceptions does not show that the testimony was incompetent, nor that it was material.

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 Gray v. Harris.
 

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4. The instructions were sufficiently favorable to the defendant. The only part now objected to is the ruling that, if the defendant "was interested in the profits of the business, or was a partner, he could be held under this indictment." The argument of the defendant's counsel is, that this ruling authorized the jury to convict the defendant, if he was not a partner, but was to receive a part of the profits as compensation for doing any lawful business for Connor. But we think it is clear from the context, that the instruction meant that he must be interested in the profits as a proprietor of the tenement, and must have been so understood by the jury.

*Exceptions overruled.*

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HENRY GRAY & others vs. SAMUEL HARRIS.

A person building a dam across a stream subject to extraordinary freshets is bound to construct it to resist such freshets, although they occur only once in several years and at no regular intervals.

TORT for injuries to the plaintiffs' coal-yard by maintaining a mill-dam in an unsafe condition. Trial, and verdict for the defendant, in the superior court, before *Rockwell, J.*, to whose rulings the plaintiffs alleged exceptions. The case is stated in the opinion.

*W. L. Smith*, for the plaintiffs.

*A. L. Soule*, for the defendant.

CHAPMAN, C. J. The degree of care which a party is bound to use in constructing a dam across a stream is well stated in Angell on Watercourses, § 386. It must be in proportion to the extent of the injury which will be likely to result to third persons provided it should prove insufficient. And it is not enough that the dam is sufficient to resist ordinary floods; for if the stream is occasionally subject to great freshets, those must likewise be guarded against, and the measure of care required in such cases must be that which a discreet person would use if the whole were his own. In *Mayor, &c. of New York v. Bailey*, 2 Denio, 433, it was held that the dam should be sufficient to resist, not

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merely ordinary freshets, but such extraordinary floods as may be reasonably anticipated. See also *Lapham v. Curtis*, 5 Verm. 371. The case of *Shrewsbury v. Smith*, 12 Cush. 177, is not at variance with this principle. But it was not necessary to state its application to the case of an extraordinary flood.

This defendant's dam was built in 1858, and in a freshet which occurred October 4, 1869, it proved to be insufficient, and gave way, and injured the plaintiffs, as stated in their declaration. One of the witnesses represented it as "a big storm; could not say it was the biggest storm he ever knew; an extraordinary storm, such a storm as we do not often have; the same storm that cut the Boston and Albany Railroad at Wilbraham; at the time he was superintendent of streets in Springfield, he had seen storms which he thought damaged the streets more than this." In 1859 the water ran over the whole length of the dam. The dam was made of earth, was 210 feet long, and was not as high in 1869 as in 1859, and the engineer who built the dam testified that at a freshet in the winter of 1860 he was able to control the water at the dam, but thought he could not have done it if the dam had not been higher than in 1869. One witness testified to his impression that he had seen the water run over this dam two or three times since 1858, and another thought he had seen it run over once or twice. It is impossible for us to say judicially upon this evidence that this was so great a freshet that the defendant was not bound to anticipate and provide against it.

It appears that during the freshet some provision was made to protect the dam by opening gates, but it was insufficient to prevent breaches, and the water poured through the breaches into the plaintiffs' coal-yard. Whether the defendant did all that he reasonably should have done is a question for the jury.

The court directed a verdict for the defendant on the ground that this was an extraordinary storm; more extraordinary than the storms that occur in spring and fall freshets; and spoke of it as a notoriously great freshet. But the rule above stated required the defendant to provide against still more extraordinary storms than occur in usual spring and fall freshets; such freshets as are known to occur only once in several years and at no regular inter-

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Higgins v. Dewey.

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vals. This dam had been standing about eleven years ; and was probably designed to stand several years longer ; and the evidence tends to show that there have been one or two floods, since it was built, which the jury would be authorized to find were quite similar to this one, at this stream. We cannot therefore say judicially that this flood should not have been anticipated and provided against. That question should have been left to the jury.

*Exceptions sustained.*

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NORMAN H. HIGGINS vs. DAVID B. DEWEY.

A man who sets and keeps a fire on his own land negligently is liable for injury done by its direct communication to his neighbor's land, whether through the air or along the ground, and whether or not he might reasonably have anticipated the particular manner and direction in which it was communicated.

In an action for setting a fire on the defendant's land so negligently that it spread to the plaintiff's land and burned his timber, the opinion of a person experienced in clearing land by fire, that there was no probability that a fire set under the circumstances, as described by the witnesses, would have spread to the plaintiff's land, is inadmissible to disprove negligence on the part of the defendant.

TORT for setting and guarding a fire on the defendant's land so negligently that it spread to the plaintiff's land and burned his timber.

At the trial in the superior court, before *Rockwell, J.*, there was evidence tending to show that the defendant, for the purpose of destroying brush on his land, set fire to the brush within six feet of the plaintiff's adjoining land, which was covered with brush ; that very soon afterwards fire was discovered on the plaintiff's land, some sixteen rods distant, and over the brow of a ridge of land some thirty or forty feet above the level where the defendant's fire was set ; that, if this fire on the plaintiff's land was communicated from the defendant's fire, it was done by means of cinders carried by the wind ; that the ground was very dry ; that there was a high wind blowing in the direction in which the place where fire was first discovered on the plaintiff's land lay from the fire on the defendant's land ; and that afterwards the fire crossed from the defendant's land directly upon the plaintiff's land, and this fire united with the fire on the ridge.

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Higgins v. Dewey.

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There was no evidence of negligence on the part of the defendant in guarding the fire after it was set.

The defendant offered to prove by William Wells, a surveyor and civil engineer of many years' experience in clearing land by fire, who had observed the effect of wind on fires in different localities, had been upon the land where the defendant set his fire and made a plan of it, and was acquainted with the surrounding country, that there was no probability that a fire set under the circumstances in this case, as described by the witnesses, would be communicated to the plaintiff's land; but the judge excluded the evidence.

The defendant requested the judge to instruct the jury "that if the fire caught on the plaintiff's land, from the fire of the defendant, by being carried in the air over the ridge from ten to sixteen rods, unless they were satisfied that men of ordinary prudence would not set the fire for fear that it would be carried in the air over the ridge, then the plaintiff could not recover; that unless the defendant would reasonably apprehend that fire would be carried over the ridge, in the air, from the fire made by him, and set fire to the plaintiff's wood, then the defendant was not guilty of negligence, if the fire was actually communicated in that manner, and the plaintiff could not recover; that unless they were satisfied that the fire actually caught from the defendant's fire, and also that he ought to have foreseen that it would probably be communicated in the way it was communicated, then their verdict must be for the defendant; and that even if it was careless for the defendant to set his fire on that occasion, yet if the fire was communicated by the defendant's fire to the plaintiff's property in a manner which men of ordinary prudence and care would not reasonably apprehend and anticipate, then the plaintiff could not recover." But the judge refused to give these instructions in the form requested, and instructed the jury that "to maintain his action the plaintiff must prove that the fire which occasioned the damage to his wood was communicated thereto from the fire which the defendant had set on his own land, and that the defendant in burning his brush did not use due and reasonable care in setting the fire, and in said burning did

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*Bailey v. New Haven and Northampton Company.*

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not use due and reasonable care and diligence to control the fire, and prevent its escape and communication to the adjoining and surrounding lands ; and that the burden of proof upon both these propositions was upon the plaintiff."

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

*H. B. Stevens*, for the defendant.

*G. M. Stearns & M. B. Whitney*, for the plaintiff, were not called upon.

GRAY, J. The instructions requested were rightly refused, and the instructions given were correct and sufficient. A man who negligently sets fire on his own land, and keeps it negligently, is liable to an action at common law for any injury done by the spreading or communication of the fire directly from his own land to the property of another, whether through the air or along the ground, and whether he might or might not have reasonably anticipated the particular manner and direction in which it is actually communicated. *Tubervil v. Stamp*, 1 Salk. 13; 2 Salk. 726; 1 Ld. Raym. 264; 3 Ld. Raym. 375; Com. 32; Comb. 459; Skin. 681; 12 Mod. 152; Carth. 425; Holt, 9. *Filliter v. Phippard*, 11 Q. B. 347. *Barnard v. Poor*, 21 Pick. 378. *Perley v. Eastern Railroad Co.* 98 Mass. 414.

The testimony of Wells was rightly excluded, because it related to an immaterial question, and to a subject within the common knowledge of the jury. *White v. Ballou*, 8 Allen, 408. *Luce v. Dorchester Insurance Co.* 105 Mass. 297.

*Exceptions overruled.*

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**WILLIAM S. BAILEY vs. NEW HAVEN & NORTHAMPTON  
COMPANY.**

In an action against a railroad corporation for running a train over the plaintiff at a crossing where there was a single track and no flagman, a witness, called as an expert by the defendants, cannot be asked what is the custom of railroads in maintaining a flagman at crossings similar to the one in question, or at crossings where there is one track.

TORT for personal injuries occasioned to the plaintiff by his being run over by a train of the defendants at a crossing of their railroad and a highway.

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Bailey v. New Haven and Northampton Company.

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At the trial in the superior court, before *Rockwell, J.*, it appeared that there was but one track on the railroad; and there was conflicting evidence as to the rate of speed at which the train was running at the time and place of the accident, as to how far one could see up the track at different distances therefrom on the highway, and whether the defendants failed to give the usual signals by bell and whistle.

The plaintiff contended that the defendants were not exercising reasonable care in omitting other precautions; as for instance, in omitting to maintain a flagman at the crossing. The defendants, for the purpose of showing that they were in the exercise of reasonable and ordinary care, proposed to two witnesses, admitted to be experts, the following questions: "What is the custom of railroads in maintaining a flagman at crossings similar to this crossing? What is the custom of railroads in maintaining a flagman at crossings where there is one track?" But the judge did not allow the questions to be put.

The jury returned a verdict for the plaintiff, and the defendants alleged exceptions.

*E. B. Gillett*, (*H. B. Stevens* with him,) for the defendants.

*G. M. Stearns*, for the plaintiff, was stopped by the court.

CHAPMAN, C. J. The point in issue was whether the defendants had used due care. The duty of each party was, as stated in *Shaw v. Boston & Worcester Railroad Co.* 8 Gray, 45, 66, to use such reasonable degree of foresight, skill, capacity and actual care and diligence as to enable each to use the privilege of crossing "with due regard to the safety of all others using like precautions, skill and care, and such as a person of ordinary sense, prudence and discretion would use in regard to his own affairs under like circumstances." See also *Bradley v. Boston & Maine Railroad*, 2 Cush. 539.

The thing sought to be proved by these witnesses called experts was not properly a custom by which parties dealing together are bound, and which, when proved, tends to establish their rights as against each other. It was rather a practice of railroad companies as to using or omitting a certain precautionary measure at certain crossings. But the need of a flagman depends much upon



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the situation and circumstances of each particular crossing, and these must be known in order to determine intelligently whether or not there ought to be a flagman there. The practice at each crossing would therefore raise a separate collateral issue; and if it were settled, it would not aid us in determining the issue before us.

In this case, evidence was given in respect to the track, the motion of the train and other particulars, which was pertinent to the issue, and tends to show how much the necessity of maintaining a flagman must depend upon the particular circumstances of each crossing, and also the circumstances of each occasion of crossing, and how valueless the evidence would be if it took no account of these particulars. It also tends to show that evidence which should undertake to go into these particulars would present cases so unlike, that they would not be pertinent to the issue in this case. We think the evidence was properly excluded.

*Exceptions overruled.*



### ORIN W. BEACH vs. JOSHUA W. BEMIS.

In an action for deceit in the sale of a horse, the defendant may prove a conversation which occurred at the time when he himself bought the horse between him and the person from whom he bought it and derived all his knowledge of it.

TORT for deceit in the sale of a horse. The answer denied deceit. At the trial in the superior court, before *Pitman*, J., the defendant, in reply to the plaintiff's case, testified that he purchased the horse of Oakes A. Dixon the day before he sold it to the plaintiff, and that all he knew of the horse was what Dixon told him. The defendant and two other witnesses were then allowed, against the plaintiff's objection, to testify to the substance of the conversation between the defendant and Dixon at the time the defendant bought the horse, and at which the plaintiff was not present. Dixon was not called as a witness.

The jury returned a verdict for the defendant, and the plaintiff alleged exceptions.

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Nettleton v. Beach.

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*A. M. Copeland*, for the plaintiff.

*E. B. Gillett & H. B. Stevens*, for the defendant.

AMES, J. As the *scienter* was directly in issue, the defendant had a right, in answer to the case made against him, to testify that he had no knowledge of the existence of the alleged unsoundness or faults of the horse. But a mere general disclaimer of such knowledge would not of itself answer the purpose of a full defence, inasmuch as a false representation, recklessly made, without any knowledge, information or grounds of belief, would not differ in its legal effect from an assertion known to be false. It was therefore material to him to show what information he had on the subject, and to satisfy the jury that he might reasonably, and that he did in fact, believe it to be true. If he had made representations which proved not to be true, the only way in which he could show affirmatively that they were honestly made would be by showing the particulars of the information that he had received, the manner and circumstances of its communication, and its effect on his own mind. The evidence offered was therefore undoubtedly competent. Its credibility and effect were for the jury to determine.

*Exceptions overruled.*

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EDWARD B. NETTLETON *vs.* CHARLES A. BEACH.

A conditional judgment for the full amount of a promissory note, rendered in a suit to foreclose a mortgage given to secure the note, is no bar to an action to recover back money had and received from the debtor by an attorney at law to be applied in part payment of the note, which he was then holding for collection, and on which he neglected to apply it.

CONTRACT for money had and received. Trial in the superior court, before *Rockwell, J.*, who after a verdict for the defendant reported for the revision of this court the case which is stated in the opinion.

*H. Morris*, for the defendant.

*W. S. Green*, for the plaintiff.

CHAPMAN, C. J. It appears by the evidence offered, that the defendant received of the plaintiff's son the sum of \$200, for

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which he gave the following receipt: "Springfield, March 19, 1867. Received of E. B. Nettleton, to be applied on note held by Elijah Libby, two hundred dollars. Charles Beach." This receipt proves what he agreed to do with the money. It is admitted that it was not applied on the note, but that the note was secured by a mortgage, which had been left with the defendant and his father, as attorneys and copartners, for collection. They commenced a suit to foreclose the mortgage, and took a conditional judgment, without the knowledge of Nettleton, for the whole amount of the note. The object of this action is to recover back the money. The defendant contends that the judgment is a bar to this action. If Nettleton had paid the money to Libby, this would have been so. For it would have been a payment *pro tanto*, and Nettleton would have had his day in court to compel the application of it; and if he neglected to enforce his rights then, the judgment would be conclusive, between the parties, as to the amount due. *Loring v. Mansfield*, 17 Mass. 394. *Jordan v. Phelps*, 3 Cush. 545. *Sacket v. Loomis*, 4 Gray, 148. *Fuller v. Shattuck*, 13 Gray, 70. But these cases were held to be distinguishable from *Fowler v. Shearer*, 7 Mass. 14, 22. In that case, as in this, the defendant was an attorney, who held a note against the plaintiff for collection. The plaintiff paid him a sum of money to be indorsed or applied upon it; but he neglected to apply it, and took judgment for the whole amount. It was decided that he held the money in trust, and was liable to the plaintiff for not applying it according to his agreement.

There is a plain distinction between payment to the creditor, which is of itself a payment on the debt, and payment to a third person, upon his executory contract to apply or indorse it. The debtor has no day in court as to him, and cannot compel the creditor to apply it, without proving the payment, and also the authority of the attorney to receive it. The transaction is wholly independent of the debt, till the application is actually made, and there is no principle upon which a judgment in favor of the creditor should operate as an estoppel in favor of the attorney as to his personal contract with the debtor. *New trial ordered.*

## CHARLES McDERMOTT vs. ROBERT E. CLARY.

In an action on a judgment recovered in another state in a suit for the use and occupation of a house, the only issue to the jury was whether the defendant was served with process or appeared in said suit, and he was called as a witness. *Held*, that allowing him to testify that he was not a resident of said state, but was there as an officer of the army, and occupied the house as military quarters assigned to him by his superior officer, afforded no ground of exception.

In a civil suit in another state the defendant was not served with process, and did not appear; but, having been proceeded against in the name of the state for contempt in resisting an attachment therein, he appeared by counsel in the proceedings for contempt. *Held*, that an action could not be maintained here on a judgment rendered against him in the suit.

CONTRACT upon a judgment rendered by the law court (so called) of Memphis in Tennessee, against this defendant, upon his default, in favor of Charles McDermott, for the use of himself and George W. Duvall, guardian, in a suit brought for the use and occupation of a house in Memphis. Duvall having died, the action was brought in the name of McDermott alone. Trial and verdict for the defendant, in the superior court, before *Rockwell, J.*, who allowed a bill of exceptions, of which the material parts were as follows:

“The plaintiff put in an exemplified copy of the record of the suit in which the judgment was recovered, which set forth a return of Phineas M. Winters, sheriff, that he had served a summons on the defendant.

“The defendant denied the jurisdiction of the court in Tennessee, and that he was ever served with process, employed counsel, or appeared in the action in Tennessee; but testified that there was another suit brought to recover possession of the house for the use and occupation of which judgment was recovered in the case now in suit; that he was served in that suit; that, in the suit in which he was served, a process was attempted to be served attaching his property; that this attachment was resisted, and he was proceeded against for contempt; that he had only two suits, the ejectment and the contempt suit; and that he did employ counsel in the contempt case, but supposed the contempt arose in the case for possession, in which he employed counsel.

"The plaintiff put in a record of the proceedings in the possession case in Tennessee, and it did not appear thereby that any proceedings for contempt were had in that case, while the record of proceedings in the case for use and occupation did show such attempt to attach, and subsequent proceedings for contempt against the defendant," in which he was summoned to answer to the state of Tennessee for his contempt in resisting the attachment.

"The defendant, under the objection of the plaintiff, testified as follows: 'I was in Memphis from September 1864 to July 1866. I was deputy quartermaster general. I belonged to the army then and now. There was quite a large force then at Memphis, ten to fifteen thousand men, under command of General Washburn. I was under his command by order of the secretary of war. I performed the duties of quartermaster general. The house in question was assigned to use for my quarters. It was formerly occupied by a rebel general; and when we took the city it was assigned to me for my quarters. I occupied the whole house from September 1864 to July 1866. I occupied only in my official character as quartermaster general, by order of the secretary of war. I have heard read the record of a certain suit here. I never heard of it until after I had left Memphis a year and a half. Duvall had sued me before this in a suit for possession. I knew a man by the name of Winters, who was sheriff there. He never read a paper to me in the world, or gave me any notice. General Bankhead was city attorney there, and appeared for me in a suit for ejectment; but I never did anything to recognize the authority of the court in this case, and never appeared either in person or by counsel. I never was a resident of the state of Tennessee, and remained in Tennessee only so long as I was ordered by the secretary of war. I never heard of any suit by McDermott, or was served with process in any such suit.' The occupation, testified of by the defendant, of the house, was the same for which the action was originally brought in Tennessee.

"The judge, upon objection of the plaintiff to this evidence, said he would admit it, as it might bear upon the question of service. The evidence was then put in, and nothing more was said

about it until the argument of the case, when the defendant's counsel argued upon the facts contained in all said evidence, as bearing upon the question of service and appearance in court, which were the only questions submitted to the jury.

"The defendant asked the judge to rule that 'if no proper service had been made, and the defendant under a misapprehension of the facts employed an attorney to appear for him, such appearance would not give the court jurisdiction.' The judge gave this instruction, with the qualification 'that if the defendant employed counsel under the misapprehension that the contempt was in the possession case, it would not be proof of an appearance in the case in which the judgment sued upon was recovered.'"

*G. M. Stearns*, for the plaintiff.

*H. Morris*, for the defendant.

MORTON, J. This is an action upon a judgment recovered in Tennessee. The plaintiff put in evidence an exemplified copy of the record of the court in Tennessee, showing that the plaintiff had recovered a judgment against the defendant, upon his default, for the use and occupation of a house in Memphis. The defence was, that the court in Tennessee had no jurisdiction to render the judgment, the defendant not being a resident of that state, and not having been served with process.

1. The first exception is to the testimony of the defendant set forth in the bill of exceptions. The objection at the trial was a general one to the whole testimony; but much of it bore directly and immediately upon the question whether any service in the suit had been made on the defendant. This the plaintiff now concedes was admissible, it being competent for the defendant to show by parol that the return of the officer was false, and that in fact there was no service on him. *Carleton v. Bickford*, 13 Gray, 591. But he objects to the testimony of the defendant, to the effect that he was not a resident of Tennessee, and that he was in Memphis as an officer of the army, and occupied the house in question as his military quarters assigned to him by his superior officers.

We think it would be too strict a rule to hold that the defendant should be confined to a bare denial of the fact that service

was made on him. The testimony as to the capacity and mode in which he was occupying the house tended to show his relation to the parties and cause of action, and would be of some aid to the jury in deciding the issue before them. It would enable them more intelligently to weigh the testimony as to this issue, and determine the credit due to it. It was admitted solely upon the question of service, and we do not think it is so foreign to this issue as to make its admission a ground for a new trial.

2. The only other exception was to the ruling of the presiding judge, set out in the bill of exceptions. It appeared at the trial, that two suits had been commenced by the plaintiff against the defendant; one being an action of ejectment for the possession of the house in question, and the other being for use and occupation of the same house. The defendant testified that he employed counsel in the ejectment suit, but did not employ counsel in the suit for use and occupation. He further testified that he employed counsel in the contempt case, but supposed the contempt arose in the ejectment case. It appeared from the record put in by the plaintiff, that the proceedings for contempt arose in the suit for use and occupation, and not in the ejectment suit. In view of this testimony, the court ruled, (as we understand the bill of exceptions,) in substance, that if the defendant employed counsel in the proceedings for contempt, under the mistaken belief that these proceedings grew out of the suit for possession, it would not be proof of an appearance in the case in which the judgment sued upon was recovered. We are of opinion that this ruling was correct. The process for contempt, though it arose out of the suit for use and occupation, was an entirely distinct proceeding, in behalf and in the name of the state, and not of the plaintiff. An appearance, whether voluntary or compulsory, to answer to that process, would not prove an appearance in the civil suit. It is immaterial whether the defendant acted under the mistaken belief that the process of contempt grew out of the ejectment suit or not. In either case, the appearance in the contempt proceedings would not be equivalent to, nor prove, an appearance in the suit for use and occupation. *Exceptions overruled.*

**AMAZIAH MAYO vs. MARY G. MERRITT.**

A testator devised to his wife one third of his real estate during her life; authorized his executor to sell any or all of his real estate at such times and in such portions as he should judge most for the interest of those concerned; and if his wife should not desire to occupy one third of his real estate, then he directed the executor to sell the whole of his real estate as soon as it should be deemed best, invest the proceeds, and pay over to her the income of one third thereof during her life. The wife occupied the real estate from the time of the testator's death. Some years after his death, one undivided third of the real estate for her life was set off on an execution against her, and afterwards the executor sold the whole real estate under the power in the will. *Held*, that the execution creditor had no title in the land against the executor's grantees.

PETITION for partition of real estate in Springfield. The case was submitted to the judgment of the court on facts agreed substantially as follows :

Roderick Norton died in 1859, seised of the land described in the petition, leaving a last will, of which these were the material provisions :

"I give and bequeath to my wife, Elizabeth Norton, one third of my personal estate, after the payment of my debts, to have the same forever, and also the use, income and improvement of one third of my real estate during her natural life, and after her decease I give said one third of my estate to my daughter Jane E. Norton, and to her heirs and assigns forever."

"I hereby constitute and appoint Charles A. Winchester sole executor of this will, and I hereby authorize and empower him to sell any or all of the real estate left by me, at such times and in such portions as he shall judge most for the interest of those concerned. In case my wife should not desire to occupy the one third of my real estate aforesaid, then I direct my executor to sell the whole of my real estate as soon as it shall be deemed best, and safely invest one third of the proceeds thereof, and pay over the income of the said one third to my wife during her life, and at her decease to pay the said one third to my daughter Jane E. Norton or her legal heirs."

Elizabeth Norton occupied the land ever since her husband's death.



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The petitioner claimed title to one undivided third part of the premises during the life of Elizabeth Norton, by virtue of a levy thereon, in 1868, of an execution in his favor against her. The respondent claimed title to the whole of the premises under a deed from the executor, in 1871, under the power in the will, and also claimed under a mortgage made by the testator in his lifetime, the facts concerning which are now immaterial.

*J. E. McIntire*, for the petitioner.

*C. A. Winchester*, for the respondent.

AMES, J. By the terms of the will, the executor is intrusted with a general discretionary power to sell all or any part of the real estate whenever he shall think it "most for the interest of those concerned." The final distribution of the property could not well be made until after the decease of the widow, and the testator must be supposed to have considered it possible that it might in the mean time become advisable to make an entire change in the form in which his property had been invested. He therefore selects the executor as a person in whose judgment he had confidence, and he imposes upon him the trust and responsibility of settling that question whenever it should arise. The beneficiaries under the will hold whatever interest in real estate it bestows upon them, subject to the general power on the part of the executor to change the real estate into personal, whenever in the execution of his trust he may think it expedient so to do. *Russell v. Lewis*, 2 Pick. 508. *Earle v. Washburn*, 7 Allen, 95. The widow has no title which she can convey to a third person so as to prevent any deed which the executor may lawfully make in execution of his trust from going into full effect. Whatever deed she can make can be immediately defeated and rendered ineffectual by the deed which he may make. Her right to the use and income of the real estate must come to an immediate end, and be transformed into a share in the income of a different form of investment, whenever he shall see fit to execute the power of sale which is intrusted to him for the benefit of all concerned. It is plain that her creditors can take from her no larger title than she has to give. *Staples v. Brown*, 13 Allen, 64. We do not think that the fact that she personally occupied

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the real estate was intended by the will to operate as a restraint upon the exercise of the power of sale, or that her election so to occupy the estate was necessarily irrevocable. The respondent holds by virtue of a deed which the executor had a right to make, and has thereby acquired a title superior to any which the widow could convey, or which her creditors could acquire by legal process against her.

As these considerations dispose of the case, it has not been considered necessary to discuss the question as to the effect of the mortgage given by the testator in his lifetime, and now held by the respondent.

*Petition dismissed.*

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**HIRAM E. EMERY & another, executors, vs. GEORGE T. WASON & others.**

A testator bequeathed to his son during his life "the income of my stock" in a certain corporation, "the principal of said stock to be held by my executors during his life, and at his decease I give the same to" his surviving children. At the date of the testator's will and of his death, he owned certain shares in the stock of the corporation, and had also subscribed for shares in new stock and paid half the price thereof; but he died before the day on or before which the other half was payable, and his executors paid it and took the certificates of the new shares. *Held*, that the new shares passed by the bequest.

**BILL IN EQUITY** by the executors of the will of Thomas W. Wason. The case, as appeared from the bill and answers, on which it was reserved by the chief justice for the determination of the full court, was as follows :

Thomas W. Wason, by his will made May 3, 1870, in his last sickness, gave to his son George T. Wason "the income of my Boston & Albany Railroad stock during his life, the principal of said stock to be held by my executors during his life, and at his decease I give the same to his child or children who may survive him." He gave several other legacies, specific and pecuniary, but did not dispose of his residuary estate.

At the time of making his will, the testator was the owner of one hundred and ten full shares of the stock of the Boston

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& Albany Railroad Company, and had subscribed for ninety shares in certain new stock which the corporation had voted to issue in order to increase its capital. He had become entitled to subscribe for and take at par twenty-two of these ninety shares, as a stockholder in the corporation, and had become entitled to subscribe for and take at par the remaining sixty-eight of the ninety shares, by purchasing the rights of other stockholders. He had paid to the corporation fifty per cent. of the par value of the ninety shares, and the other fifty per cent. was payable on or before October 1, 1870.

The testator died on August 21, 1870, without having paid anything more than the first fifty per cent. on the new stock, and without having taken a certificate thereof; and the plaintiffs, after his death, paid the remaining fifty per cent. and received the certificate of the stock. The question presented to the court was, whether this new stock passed by the bequest for the benefit of George T. Wason and his children, or was to be disposed of as residuary estate.

*M. P. Knowlton*, for George T. Wason and his children.

*N. A. Leonard*, for other defendants.

AMES, J. By the act of subscribing for new shares in the stock of the railroad corporation, the testator became entitled to have them allotted to him, and to have them stand in his name on their books. No conveyance from the corporation was necessary to his title. By the same act he also made himself liable to the corporation for all lawful assessments; and by the terms of the statute that liability could be enforced by forfeiture and sale of the shares, leaving him personally liable for the deficiency, if the shares so forfeited should not sell for a sum sufficient to pay his assessments with interest and the charges of sale. Gen. Sta. c. 63, § 9.

The language of this statute plainly imports that the title of such a subscriber is not a mere personal privilege, but that of a shareholder. What is taken from him and sold, in case of forfeiture for neglect to pay assessments, is not a mere right of subscription, but the shares for which he has subscribed. His shares are sold and transferred to the purchaser. The surplus, if on sale

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they produce more than enough to pay the assessments, with interest and charges of sale, is to be accounted for to him as owner. A general bequest of all the testator's stock in a given railroad company must be construed as including that which is only in part paid for, as well as that which has been fully paid and certified. In either case it is stock, belonging to him, and capable of being transferred by his conveyance.

Without considering the question whether the testator's subscription to the new stock was of itself sufficient to create a contract to pay all assessments, and to give to the corporation a right which it could enforce by an action of contract; and even upon the assumption that the only mode in which the corporation could compel subscribers to pay their assessments is by the sale of delinquent shares, in the manner provided by statute; we think that the will requires in effect that the executors should pay the remaining instalment from the funds of the estate in their hands. At the date of the will the testator was the owner of two hundred shares. He had subscribed for ninety of the new shares, and it must be assumed that he did so with the intention and expectation of paying for them. He had paid one half of the amount at the time it became due, and if he had lived until the first day of the following October he would have paid the other half, which then became due. He intended that his investment in that stock should be the full amount of two hundred shares. He also intended that the whole income of those shares should go to his son, George T., during his life; and it is safe to say that he did not expect, and the will certainly does not require, that his son should pay the instalment that became due on October 1, 1870. No authority is given by the will to the executors to sell the shares or any of them; on the contrary, they are required to hold them during the life of George T., and at his decease to convey them to his child or children who shall survive him. The only way in which the executors could possibly fulfil their trust, so as to give to the son George T. the income intended for him during his life, and also so as to retain the shares themselves in their own hands until his decease, and upon that event to transfer them to his child or children surviving him, was to save them

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from forfeiture and sale in consequence of neglect on their part to pay the remaining instalment. It was impossible that they could yield the income intended for George T. Wason during his lifetime, or constitute a portion of the fund for the benefit of his child or children after his decease, in any other way. If the executors had suffered the treasurer of the corporation to sell the ninety shares for neglect on their part to pay the remaining instalment, the effect would have been that the income intended for the testator's son (so far as this description of stock is concerned) would have been reduced to but little more than one half of the amount plainly intended by the will, and the capital intended for the grandchildren would have been reduced in the same proportion.

It appears to us, therefore, that the only mode, in which it was possible for the executors to give full effect to the will, was by doing what they have done in fact, and what the testator intended to do, and would have done, if he had lived; that is to say, by paying the remaining instalment, when it became due, from the general funds of the estate. Our conclusion is, that this payment was properly made by the executors; that the will does not authorize them to charge it to the account of any legatee, or to any account other than the general estate under their administration; and that the ninety shares must be held subject to the same trusts as the original one hundred and ten.

*Decree accordingly.*

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**MARY J. SNOW vs. FOWLER T. MOORE, executor.**

A testator, in his will, gave to his daughter "four hundred dollars that she has now in her possession." At the date of the will, she had no property of the testator in her possession, nor had she from that time to his death; but a short time before the date of the will he indorsed and gave to her a promissory note of her husband for that sum. *Held*, that she had no claim against the executor for a legacy.

CONTRACT against the executor of the will of Chester Chapman, to recover a legacy of \$400. Trial in the superior court, before *Pitman, J.*, who reported the following case to this court.

Chester Chapman made his will July 11, 1867, and died two days afterwards. By the will, he gave to the plaintiff, "the wife of William Snow, four hundred dollars, that she has now in her possession;" and all the "rest, residue and remainder" of his estate, real and personal, he gave to her sister.

The plaintiff testified that she had no property of any kind belonging to the testator in her possession at the date of his will or between that time and his death; that he never gave her any money; that on May 23, 1867, her husband, who then owed the testator \$800, paid him \$400 in cash and gave him his promissory note for \$400; that subsequently, on the same day, the testator indorsed the note, and handed it to her, saying he made her a present of it, and if he did not live to spend all his property there would be more for her; and that she paid him nothing on the note.

The judge on this evidence ruled that the plaintiff could not recover, and directed a verdict for the defendant, which was returned. If the ruling was right, judgment was to be entered on the verdict; but if erroneous, then the case to stand for trial.

*M. B. Whitney*, for the plaintiff.

*A. L. Soule*, for the defendant, was stopped by the court.

AMES, J. It is impossible to construe the bequest to the plaintiff as a direction to the executor to pay to her the sum of \$400 from the general funds of the estate. It does not import that anything was to be paid to her, but that she was to be allowed to keep something that she had already received. The money which the will professes to give her is described as money "that she now has in her possession;" and these terms cannot be considered as applicable to any other fund, without ascribing to the testator an intention which he certainly has not expressed. We cannot undertake to expunge from the will, as mere surplusage, the words which the testator has employed for designating with precision the subject matter upon which he meant that this bequest should operate. He evidently understood that in some way she had already had something from him of the value of \$400, and it is at least possible that he put that construction upon the disposition that he had made of her husband's note of that

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*Snow v. Moore.*

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amount. If she in fact had nothing in her possession, then the will gives her nothing; if she had any such fund in her possession, the bequest allows her to keep it. Upon either construction, nothing is due to her from the executor.

*Judgment for the defendant.*

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**WILLIAM SNOW vs. FOWLER T. MOORE, executor.**

In an action against an executor by the testator's son-in-law for board furnished to the testator, to which the defence is that he was a visitor with the plaintiff, and that the plaintiff's claim originated in disappointment at his wife's receiving less property under the will than the testator's other child, the defendant may introduce evidence of the amount of the testator's property, for the purpose of showing that the plaintiff's wife, who had a specific legacy, took less than the other child, who was residuary legatee.

In an action against an executor by the testator's son-in-law for board furnished to the testator, to which the defence was that he was a visitor and not a boarder with the plaintiff, the plaintiff's wife testified that the testator was "feeble, in poor health, lame, and of no great value for work." Held, that, to contradict this testimony, evidence was admissible of her statement that "she and her husband wished her father to come and live with them, because it would save their hiring a man."

In an action against an executor for board furnished to his testator, the defendant testified that it was worth only a certain sum per week to board the testator. Held, that the plaintiff might prove that the defendant had paid a bill for the testator's board for the preceding year at a higher rate per week.

MORTON, J. This is an action of contract to recover for eleven months' board of the defendant's testator, William Chapman, who was the father of the plaintiff's wife. It was admitted that Mr. Chapman lived with the plaintiff during the eleven months, but it was contended that he was there as a visitor, on the invitation of the plaintiff, and not as a boarder. The defendant contended and introduced some evidence tending to show that the plaintiff made no claim for board during the life of Mr. Chapman, and that "the claim in suit was made up after his death, in consequence of the plaintiff's disappointment because his wife did not receive by her father's will one half of his property." For this purpose, he introduced the will, without objection. The defendant then offered to show how much the estate of Chapman amounted to, for the purpose of showing that by the will the

plaintiff's wife received much less than Mrs. Bentley, her only sister, but the court rejected the evidence.

By the will, the testator gave a specific legacy of \$400 to the plaintiff's wife, and all the residue of his estate to Mrs. Bentley. The will alone does not show that the plaintiff's wife received any less than her sister; but the supplemental proof, that the estate was a large one, would show a great inequality in the provisions for the two sisters, and thus would show that a motive existed on the part of the plaintiff to make up this claim. We think this testimony was competent.

We are of opinion, also, that the testimony offered of the statement of the plaintiff's wife, "that she and her husband wished her father to come and live with them because it would save their hiring a man," was competent. It tended in some degree to contradict or qualify her testimony to the effect that her father was "feeble, in poor health, lame, and of no great value for work."

All the other rulings at the trial were correct. The defendant having testified that it was worth only two or three dollars a week to board Chapman, it was competent to show that he had paid a bill to one Hamilton for his testator's board for the preceding year at the rate of four dollars and fifty cents a week. Such payment was an act of the defendant tending to show that four dollars and fifty cents a week was a reasonable price for the testator's board, and thus contradicted his testimony. For the same reason, the testimony of Hamilton as to this payment was admissible. The plaintiff had the right to prove this act of the defendant, inconsistent with his testimony, by the defendant or by Hamilton, or by both.

The other exceptions taken at the trial were not argued, and need not be considered.

*Exceptions sustained.*

*A. L. Soule*, for the defendant.

*M. B. Whitney*, for the plaintiff.



EDWARD H. WELLS *vs.* WILLIAM CALNAN.

A written agreement, on which an action was brought, stipulated that the plaintiff should sell to the defendant "the farm now occupied by" the plaintiff and his father, for a certain price, to be paid at a future day specified, "no wood to be cut and removed from the premises save firewood for use in the house," and that on payment of the price the plaintiff would make and deliver to the defendant a deed of "the fee simple of the said premises." The declaration alleged a tender of a deed "of the premises described in the agreement," and a refusal by the defendant to pay the price. The answer denied such tender. At the trial, it appeared that the plaintiff tendered a deed, but that before the tender the buildings on the land were burned, whereby the estate was reduced in value from at least the contract price to less than two thirds of that price. *Held*, that the plaintiff could not recover.

CONTRACT on a written agreement, dated December 22, 1868, by which the plaintiff agreed to sell and the defendant to buy "the farm now occupied by" the plaintiff "and his father," (describing it by metes and bounds,) for \$3250, which the defendant agreed to pay on April 10, 1869, and it was provided that "no wood should be cut and removed from the premises save firewood for use in the house," that the plaintiff on receiving payment should execute and deliver to the defendant a proper deed for the conveying and assuring to him of "the fee simple of the said premises," and that for the due performance of the agreement each party was bound to the other in the sum of \$500, "which said sum is to be taken as liquidated damages." The declaration alleged the making of the agreement, and that the plaintiff executed a good and proper deed for conveying and assuring to the defendant in fee simple "the premises described in said agreement," and tendered said deed to the defendant on April 10, 1869, and demanded payment of the \$3250 of the defendant, but that the defendant refused to pay the same and also refused to pay the \$500 as liquidated damages; and that the defendant owed the plaintiff \$500. The answer admitted the making of the agreement, but denied the making or tender of a good and sufficient deed, and all the other allegations of the declaration.

At the trial in the superior court, before *Pitman, J.*, it appeared that the plaintiff tendered a deed in due form on April 10

1869; that the farm-house and outbuildings on the land were burned on the preceding day; that the defendant for that reason refused to accept the deed or pay the price; that the estate at the time of the contract was worth at least \$3250, but after the fire was worth not more than \$2000; and that the plaintiff had obtained insurance upon the buildings in the sum of \$2000, and had received of the insurance company, in settlement of his claim against them, the sum of \$1600.

The defendant offered to show that the insurance company, before the commencement of this action, offered the plaintiff to take from him a quitclaim deed of the estate, and pay him the full contract price. But the judge excluded the evidence as immaterial.

The plaintiff contended that he was entitled to the \$500 as liquidated damages, while the defendant contended that it was to be treated as a penal sum. But the judge ruled "that this question was of no importance, because, if the plaintiff was entitled to demand payment of the contract price notwithstanding the loss of the buildings, he had sustained damage to a larger amount by the defendant's refusal."

The defendant requested the court to instruct the jury that they might consider the amount received by the plaintiff from the insurance company in their estimate of his damages, and might return a verdict for nominal damages only; but the judge instructed them to the contrary.

The jury returned a verdict for the plaintiff in the sum of \$546.83, being the amount claimed, with interest; and the case was reported to this court; if error appeared in the rulings, the verdict to be set aside and a new trial had; otherwise, judgment to be entered on the verdict.

*W. G. Bates*, for the defendant.

*H. Morris & N. T. Leonard*, for the plaintiff.

GRAY, J. The principles of law, upon which the rights of the parties to this case depend, appear to have been overlooked at the trial.

When property, real or personal, is destroyed by fire, the loss falls upon the party who is the owner at the time; and if the owner of a house and land agrees to sell and convey it upon the

payment of a certain price which the purchaser agrees to pay, and before full payment the house is destroyed by accidental fire, so that the vendor cannot perform the agreement on his part, he cannot recover or retain any part of the purchase money.

For these reasons, in *Thompson v. Gould*, 20 Pick. 134, where, after the making of an oral agreement for the sale and purchase of a house and land, and the purchaser's entry into possession and payment of part of the price, but before delivery or tender of the deed, the house was destroyed by fire, it was held by this court, in an elaborate judgment delivered by Mr. Justice Wilde, that he was entitled to recover back the money paid, on the ground of a failure of the consideration.

In *Bacon v. Simpson*, 8 M. & W. 78, the plaintiff had agreed to sell, and the defendant to purchase, a lease for years of a dwelling-house at a certain price, and the furniture, tenant's fixtures and other property therein at a valuation to be made by appraisers. Before fulfilment of the agreement, or delivery of possession to the defendant, the greater part of the house and the property therein was consumed by fire. The plaintiff brought an action on the agreement, averring readiness to perform from the time of making the agreement and ever since, which was traversed by the defendant. It was held by the court of exchequer that by reason of the fire the plaintiff could not perform the agreement, and therefore could not maintain the action.

In *Taylor v. Caldwell*, 3 B. & S. 826, by a written contract one party agreed to give the other the use of a certain music hall on four specified days for the purpose of holding concerts, with no express stipulation for the event of its destruction by fire. The court of queen's bench held that upon the destruction of the building on an earlier day, by an accidental fire, both parties were excused from the performance of the contract; and, while recognizing as undoubted the rule that one who makes a positive contract to do a thing not in itself unlawful must perform it or pay damages for not doing so, declared it to be also well settled that that rule is only applicable where the contract is positive and absolute, and not subject to any condition, express or implied; and that where, from the nature of the contract, it appears that the

parties must from the beginning have contemplated the continuing existence of some particular specified thing as the foundation of what was to be done, there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the accidental perishing of the thing without the fault of either party.

The doctrine as there stated has been approved in the later English cases. *Appleby v. Meyers*, Law Rep. 1 C. P. 615 ; *S. C.* Law Rep. 2 C. P. 651. *Boast v. Firth*, Law Rep. 4 C. P. 1. *Robinson v. Davison*, Law Rep. 6 Exch. 269. And it is illustrated by the previous decisions of this court, by which it has been held that a person who agrees to build a house on the land of another is not discharged by the destruction of the house by fire before its completion ; but that, where one agrees to repair another's house already built, such destruction of the house puts an end to the contract. *Adams v. Nichols*, 19 Pick. 275. *Lord v. Wheeler*, 1 Gray, 282.

In the present case, the agreement between the parties manifestly contemplates the conveyance of the buildings already upon the land as an important part of the subject matter of the contract. It describes the property to be conveyed as the farm occupied by the vendor and his father, and contains a provision that until the day appointed for the delivery of the deed no wood shall be cut and removed from the premises save firewood for use in the house. The vendor agrees to execute and deliver a proper deed for the conveying and assuring to the purchaser of the fee simple "of the said premises." The price stipulated to be paid is an entire sum ; and the report states that it appeared in evidence at the trial that the estate at the time of the contract was worth at least that sum, and after the fire was not worth two thirds as much.

The case differs from those in which a lessee is held liable to pay rent or make repairs according to his covenants, notwithstanding the destruction of the buildings by fire or other accident during the term. There the lessor, by the execution and delivery

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of the lease, has fully performed the contract on his part; and the lessee, having thereby become the owner of the leasehold interest, must bear the same risk of fire or casualty as any other owner of property, and is not excused from performing his own express covenants. *Fowler v. Bott*, 6 Mass. 63. *Kramer v. Cook*, 7 Gray, 550. *Leavitt v. Fletcher*, 10 Allen, 119. But in the case at bar the defendant has only agreed to pay the purchase money upon tender of a deed of the whole estate contracted for, including the buildings as well as the land; and, the buildings having been wholly destroyed by fire on the day before that appointed for the conveyance, the plaintiff did not and could not tender such a conveyance as he had agreed to make or as the defendant was bound to accept, and was not therefore entitled to maintain any action against the defendant upon the agreement.

It was contended at the argument that this defence was not open under the pleadings. But the declaration alleges that the plaintiff tendered to the defendant a good and proper deed for the conveying and assuring to the defendant the premises described in the agreement; and this allegation is met by a direct denial in the answer.

The result is, that the rulings of the superior court were erroneous, because inapplicable to the case, that there has been a mistrial, and that the

*Verdict must be set aside, and a new trial had.*



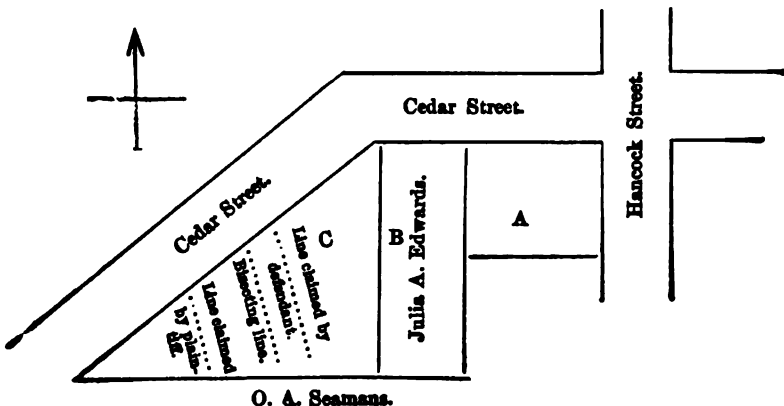
JANE HARVEY vs. JAMES A. BYRNES.

A. B. conveyed to C. D. three adjacent lots of land for \$1600; C. D. sold the middle lot to E. F. and afterwards conveyed to the plaintiff for \$100 the eastern part of the third lot by deed describing the granted premises as bounded on the east by E. F.'s land and on the north and south by lines running to stakes and stones, "meaning to convey to" the plaintiff "one half of all that I now own of land conveyed to me by A. B., said land to be surveyed and the bounds set." The land was never surveyed, nor were bounds set. C. D. afterwards conveyed to the defendant the western part of the third lot by a warranty deed describing by metes and bounds the granted premises, which included more than half of the third lot. The plaintiff built and occupied a house on a part of the third lot east of the land covered by the description in the deed to the defendant. *Held, that*

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the description of the premises conveyed to the plaintiff was so uncertain, that she could not maintain trespass for acts done by the defendant on any part of the land covered by the description in the deed to him.

TORT for breaking and entering the plaintiff's close in Springfield. At the trial in the superior court, before *Pitman, J.*, it appeared that by deed dated July 8, 1864, William Hynes conveyed to Patrick Hynes, for \$1600, the three lots of land marked A, B and C, on the plan copied in the margin; that by deed dated July 31, 1865, Patrick Hynes, in consideration of \$100, conveyed to the plaintiff "a certain parcel of real estate situated on the south side of Cedar Street in Springfield, bounded and described as follows: Beginning at land of Julia A. Edwards, thence westerly on said Cedar Street to stake and stones, thence in a southerly direction to stake and stones in the southerly line of said lot, thence easterly to Julia A. Edwards's land, thence northerly on said Julia A. Edwards's land to place of beginning. Meaning to convey to said Jane one half of all that I now own of land conveyed to me by deed of William Hynes dated July 8, 1864, said land to be surveyed and the bounds set;" that on July 31, 1865, all that Patrick Hynes then owned of land conveyed to him by the deed of William Hynes, was lots A and C; that the area inclosed between Cedar Street on the north, Julia A. Edwards on the east, O. A. Seamans on the south, and the line marked "Line claimed by plaintiff" on the west, was equivalent to half of the sum of the lots A and C; that the area



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inclosed between Cedar Street on the north, Julia A. Edwards on the east, O. A. Seamans on the south, and the line marked "Bisecting line" on the west, was equivalent to half of lot C; that the plaintiff built in 1866, and since occupied, a house a few feet east of the line marked "Line claimed by defendant," on lot C, which lot was uninclosed; that there were no stakes or stones at the points referred to as such in the deed to the plaintiff, at the time the deed was made, nor any other means of fixing his western boundary except by measurement; that no western boundary had been established to which the parties to the suit assented; that Patrick Hynes, after the conveyance to the plaintiff, conveyed to Alley Hynes, by warranty deed, the westerly portion of lot C, the easterly boundary of the granted premises being the line marked "Line claimed by defendant," and Alley Hynes, by warranty deed, conveyed the same to the defendant; that the defendant did the acts alleged to be a trespass, under said conveyance to him, on that part of lot C comprised between the line claimed by the plaintiff, and the line claimed by the defendant; and that no survey of the premises was made by the plaintiff, nor any means taken to fix the location of her line, till after the alleged acts of trespass.

Upon these facts the judge ruled that the action could not be maintained in this form, directed a verdict for the defendant, and by consent of the parties reported the case to this court for such disposition thereof as should be proper.

*W. S. Green*, for the plaintiff.

*M. P. Knowlton*, for the defendant.

MORTON, J. The plaintiff claims under a deed from Patrick Hynes. At the date of this deed Patrick Hynes owned two lots on Cedar Street, one a rectangle, the other a triangle, separated from each other by an intervening lot belonging to Julia A. Edwards, and the deed conveys a portion of the triangular lot. Both of these lots, together with the Edwards lot, were conveyed to Patrick Hynes by deed of William Hynes dated July 8, 1864. The deed to the plaintiff, after the description, contains this clause, "meaning to convey to said Jane one half of all that I now own of land conveyed to me by deed of William Hynes dated July 8, 1864."

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Construing this deed in the light of the location of the two lots, the considerations expressed in the deeds, and the situation of the parties, we have no doubt that the intention of the parties was that the deed to the plaintiff should convey one half of the triangular lot, and not a portion of that lot equal to one half of both lots.

But the deed to the plaintiff is so uncertain that it is impossible to lay out upon the land the lot intended to be conveyed. The easterly line is fixed with certainty; but the deed does not fix the length of the northerly line on Cedar Street, or of the southerly line, either by existing monuments or by measurements. It is therefore impossible to ascertain where or in what direction the westerly line was intended to run. If the point at which either of these lines should terminate in its westerly end was fixed, the inference might be that the westerly line was to be run from that point to the other line in such a direction that it would give the plaintiff one half of the triangular lot. But the length of both lines is undetermined, and therefore it is impossible to ascertain the westerly line.

It is clear that, when the deed was made, the parties contemplated that the length of the northerly and southerly lines and the location of the westerly line, were to be determined by monuments thereafter to be erected. The deed provides that said land is "to be surveyed and the bounds set," there being no monument existing at the time. In this state of facts, if the parties had erected monuments, such monuments would govern the boundaries of the plaintiff's lot, although it might be less than one half of the triangular lot. *Makepeace v. Bancroft*, 12 Mass. 469. No monuments were erected by mutual agreement of the parties; but after the deed to the plaintiff Patrick Hynes conveyed by warranty deed, to Alley Hynes, the whole or a part of the remaining portion of the triangular lot, in which he fixed, as we understand by the report, the easterly line of the lot conveyed, by metes and bounds. He thus established monuments which as against him fixed the westerly line of the plaintiff's lot. Alley Hynes afterwards conveyed this lot to the defendant, who entered and occupied under his deed, up to the line thus established.



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His acts of occupation under this deed constitute the alleged trespass. This line, if it is to be taken as the westerly line of the plaintiff, does not give her quite one half of the area of the triangular lot, and the question is whether she can maintain an action of tort in the nature of trespass *quare clausum* for these acts of the defendant. We are of opinion that she cannot.

Possession of the premises is indispensable to the maintenance of trespass *quare clausum*. *Shepard v. Pratt*, 15 Pick. 33. She had no possession of the *locus*, actual or constructive. Her deed was inoperative, for uncertainty, to fix any westerly line, and cannot be held, as against a *bond fide* purchaser, to convey any land westerly of the line established by her grantor. The ground taken by the plaintiff, that she was in possession of the premises before the alleged acts of trespass, cannot be sustained upon the facts. She had no actual possession of the *locus*, either by cultivating it, or inclosing it, or setting up bounds. Her westerly line was to be established by monuments subsequently to be put up, and until it was established she had no constructive possession beyond what she actually occupied. *Cook v. Rider*, 16 Pick. 186.

*Judgment for the defendant.*

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LEWIS L. WHITMAN, administrator, *vs.* HARVEY PORTER & others.

The subscribers of an agreement to purchase and run a ferry boat, to be owned by them in proportion to the amounts set against their names, the toll to be applied to pay expenses, and any balance to be divided among them *pro rata*, each subscriber to have the right to sell his stock, the purchaser to have all the rights of an original subscriber, and the association to continue as long as the majority of the subscribers shall determine, are partners; one of them can maintain a bill in equity against all the others within the jurisdiction of the court to compel them to contribute to sums paid by him, although not at their request, for the use of the association; and the amount of the liability of the defendants is to be determined by an apportionment among them of the amount paid, without regard to subscribers out of the jurisdiction.

BILL IN EQUITY filed by the administrator of the estate of Lyman Whitman against Harvey Porter and fourteen others, to compel contribution to amounts paid by the plaintiff's intestate

for the use of the Agawam Ferry Company. The case was referred to a master ; was reserved on the pleadings and his report, by *Colt, J.*, for the determination of the full court ; and in substance was as follows :

The plaintiff's intestate, the defendants, and seven other persons, who were not inhabitants of this Commonwealth, subscribed a written agreement for the purpose of purchasing and running a ferry boat between Agawam and Springfield, " the same to be owned by the subscribers in proportion to the amounts set against their names, and to be held, run and managed " according to terms of which the following are the material : The boat to be conveyed to one of the subscribers in trust ; three officers and three trustees to be chosen annually, to have the entire management and control of the ferry, regulate the running thereof, and employ all the assistance necessary therefor ; " money received from the ferry to be applied first to the payment of necessary expenses, balance to be divided among the subscribers *pro rata* ; " any subscriber to have the right to sell his stock by any proper writing, and the purchaser to be entitled to all the rights of original subscribers ; " the name of the association to be ' The Agawam Ferry Company,' and to continue so long as a majority of the subscribers determine, and whenever a majority in number and value shall so decide, at a meeting called for that purpose, the ferry and property to be sold, the proceeds applied to the payment of any debts, and the balance divided *pro rata*."

The subscribers purchased a ferry and ferry boat and ran it according to the agreement ; and the trustees, of whom the plaintiff's intestate was not one, borrowed money for the use of the association on their individual notes. When these notes matured, the association had no funds to pay them, and the plaintiff's intestate, although not requested by the association, took them up ; and afterwards the plaintiff's intestate, with the consent of the trustees, took charge of the ferry and ran the boat, and the expenses incurred in so doing exceeded the receipts. The plaintiff claimed contribution towards a sum made up of the amount paid by his intestate on the notes and of the balance of the expenses incurred by him over the receipts ; and contended that he could

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recover from the defendants as if they were alone liable, without regard to associates living out of the Commonwealth.

*C. A. Winchester*, for the plaintiff.

*H. Morris*, for the defendants. The payments by the plaintiff's intestate were voluntary, and he has no remedy for them against the defendants. *Bowman v. Blodgett*, 2 Met. 308. *Winsor v. Savage*, 9 Met. 346. *Andrews v. Callender*, 13 Pick. 484.

CHAPMAN, C. J. The association between the proprietors of the ferry boat was in substance a partnership. The debts were contracted and the notes were given for the benefit of the company. As between themselves, they were ultimately liable in proportion to their interests. But as to creditors, each was liable for the whole. The case is therefore unlike that of *Andrews v. Callender*, 13 Pick. 484, cited by the defendants' counsel; for in that case the debt was due from a corporation in which the parties were stockholders, and their liability was merely under existing statutes. Nor is it like the case of *Winsor v. Savage*, 9 Met. 346, cited by the defendants, for there the plaintiff paid the defendant's debt without request, being in no way liable for it.

We do not think the payment by the plaintiff's intestate belongs to the class of voluntary payments of another's debt by a stranger to it.

A bill in equity is the proper remedy for contribution; and when some of the parties mutually liable are insolvent or have removed without the jurisdiction of the court, the plaintiff may recover in equity a contribution for the whole from the parties who remain. *Cary v. Holmes*, 16 Gray, 127.

*Decree for the plaintiff, with costs.*

**NEW HAVEN AND NORTHAMPTON COMPANY vs. JOEL HAYDEN  
& others.**

One who is a stockholder and director of a manufacturing corporation, and overseer of part of its business, has not thereby authority to bind the corporation to a contract to aid in the extension of a railroad.

Several persons signed a writing in which they described themselves as representing a large portion of business on the line of a proposed extension of a railroad, and undertook to secure subscriptions to the stock of the railroad corporation to a certain amount, and pay for the same in instalments, and also proposed to secure the right of way for the extension of the railroad, free of expense to the corporation, and to obtain the legislation needful to carry out the proposed plan, the proposition not to be binding unless they could secure the right of way or make such arrangement in regard thereto as should be satisfactory to the corporation. The corporation accepted the proposal, having at the time no authority to extend its railroad, but subsequently obtained authority from the legislature. The signers afterwards agreed in writing that it might go forward and secure the right of way without prejudice to the rights of either party; and thereupon it purchased the right of way. *Held*, in an action by the corporation against the signers for their failure to secure the right of way, that the contract was lawful, and that the burden of showing that the defendants were unable to secure the right of way was upon them.

CONTRACT against Joel Hayden, the Nonotuck Silk Company, Lewis Bodman and five others, on an agreement contained in two papers signed by them.

The first was as follows: "Williamsburg, January 26, 1866. To J. E. Sheffield, Esquire, Committee of the Northampton & New Haven Railroad Company. The undersigned, representing a large portion of business on the line of the proposed railroad from Northampton to Williamsburg, propose that, if your company will extend their road to Williamsburg as soon as practicable, we will undertake to secure good, responsible subscriptions to the stock of your company, to the amount of 1250 shares, and pay for the same in instalments, as needed for building the road. We also propose to secure the right of way for the road, free of expense to your company, from the westerly side of the town farm in Northampton to the western terminus of the road in Williamsburg, and also to obtain the needful legislation in Massachusetts to merge or consolidate the Northampton & Shelburne Falls Railroad Company with the Northampton & New Haven Railroad Company, so as to form one corporation from New Haven to Wil-

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liamsburg. It is understood that this proposition is not to be binding on our part, unless we can secure the taking of the amount of stock above named, and also the right of way, or make such arrangement in regard to the same as shall be satisfactory to your company; also that the stock (1250 shares) is not to share in the earnings of the road until the extension is in operation."

The second paper was as follows: "Williamsburg, August 13, 1867. To the New Haven & Northampton Company. The undersigned, whose names are subscribed to proposals submitted in January 1866 to the New Haven & Northampton Company for them to extend their railroad to Williamsburg, hereby agree that said company may go forward and secure the right of way for said road west of Northampton town farm, either by purchase or appraisement by the county commissioners, as said company may think best, and that it shall be done without prejudice to the legal rights of either party named in said proposals."

The declaration alleged that the defendants made the agreement above set forth, whereby they agreed to secure the right of way for the plaintiffs for their railroad, free of expense to the plaintiffs, from the westerly side of the town farm in Northampton to the western terminus of the road in Williamsburg, for divers valuable considerations on the part of the plaintiffs, all of which have been fully performed by the plaintiffs, but that the defendants neglected and refused to perform the stipulations on their part to be performed.

The Nonotuck Silk Company, in their answer, denied that they signed the papers mentioned in the declaration. The other defendants in their answers admitted that they signed the papers, denied that thereby they agreed to secure the right of way for the plaintiffs, as alleged in the declaration, or any right or rights of way whatever, and alleged "that if they agreed to do anything by said instrument, the same had been by them fully performed, and that they could not secure for the plaintiffs the right of way mentioned in said instrument, nor make any arrangements therefor to the plaintiffs, as contemplated in said instrument."

At the trial in the superior court, before *Wilkinson, J.*, the plaintiffs offered to prove that "the proposal referred to in their declaration was made by the defendants to the plaintiffs, and was accepted by the plaintiffs on February 1, 1866; that under the St. of 1866, c. 66, the plaintiffs located and constructed a railroad from Northampton to Williamsburg, being an extension of their road; that the defendants did not procure the right of way west of the town farm, and refused to pay the land damages for land taken for the road, west of said farm, and the plaintiffs were obliged to pay the same, for which, with cost and expenses occasioned thereby, this action was brought; and that the name of the Nonotuck Silk Company, annexed to the proposal, was written by Lucius Dimock, who was at the time a stockholder and director of the corporation, and overseer at Leeds, where part of the corporation's manufacturing was carried on; but the plaintiffs offered no other evidence of any authority on the part of Dimock to sign the name of the corporation."

The judge ruled that the action could not be maintained, and by consent of the parties reported the questions of law to this court; if the ruling was correct, the plaintiffs to become nonsuit; otherwise, the case to stand for trial.

*W. Allen & H. B. Stevens*, (*E. B. Gillett* with them,) for the plaintiffs.

*N. A. Leonard & D. W. Bond*, for the defendants. If the case shows a contract between the plaintiffs and defendants in relation to the extension of the plaintiffs' road, the contract is void. At the time of the alleged contract, the terminus of the plaintiffs' road was in Northampton; they had no authority to extend the road; Sts. 1853, c. 397; 1862, c. 97; and any attempted contract so to do was void. *Pennsylvania, Delaware & Maryland Steam Navigation Co. v. Dandridge*, 8 Gill & J. 248. *Abbott v. Baltimore & Rappahannock Steam Packet Co.* 1 Maryl. Ch. 542. *Pearce v. Madison & Indianapolis Railroad Co.* 21 How. 441. *Bissell v. Michigan Southern Railroad Co.* 22 N. Y. 258, 285. *Hood v. New York & New Haven Railroad Co.* 22 Conn. 502. *Richardson v. Sibley*, 11 Allen, 65. If the contract was void, it could not be ratified either by act of the legislature or consent of

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the parties. *Hackley v. Sprague*, 10 Wend. 113. *Mays v. Williams*, 27 Alab. 267. No acceptance or notice of the paper of August 13, 1867, appears on the part of the plaintiffs. Dimock had no authority to sign the name of the Nonotuck Silk Company. The defendants, when they made their proposals, represented that they were acting in behalf of a community, who were interested in the extension of the plaintiffs' railroad, and not in their own interest.

AMES, J. It does not appear that Lucius Dimock had any authority to bind the Nonotuck Silk Company by his signature to the alleged contract; and the plaintiffs therefore cannot maintain their action against that corporation.

But with regard to the other defendants the case stands upon other grounds. The written proposal of January 26, 1866, must be considered as a petition to the plaintiffs to extend their railroad from Northampton to Williamsburg. In that proposal, they describe themselves as "representing a large portion of business on the line of the proposed railroad,"—a form of expression which certainly does not mean that they were acting merely as the agents of other parties not named. We understand their language to signify that they had the control of a large amount of business which they would be willing to transfer to the proposed extension, and that it would be for the interest of the plaintiffs to make that extension. They undertake also to see that the funds necessary for that purpose shall be forthcoming, by securing good, responsible subscriptions to the stock of the plaintiff corporation, to the amount of twelve hundred and fifty shares, to be paid for in instalments as needed for the building of the road. They also undertake to secure the right of way for the road, within certain definite termini, without expense to the plaintiffs; and to obtain the legislation in Massachusetts necessary for the accomplishment of the proposed object. This proposal was accepted by the plaintiffs, and the transaction therefore had all the formal and essential elements of a binding contract, provided it was one which the parties were legally competent to make.

It is true that, at the date of this transaction, the plaintiffs had no authority to extend their railroad farther north than

Northampton, and if their contract had been simply to do what they had no legal capacity or right to do, it would have been wholly void. But this is not the true interpretation of the contract. It was a part of the defendants' proposition, to obtain from the legislature of the Commonwealth a statute for the purpose of removing this difficulty; that is to say, as we understand it, they undertook to make an application, and to take the usual and proper means for obtaining such a statute. This was a matter in which neither party had reason to apprehend difficulty; and the desired authority was in due time granted, for the extension of the road and the increase in the capital stock of the company necessary for that purpose. St. 1866, c. 66. The proper interpretation of the defendants' request therefore is this: If, when the needful legislation is obtained, the railroad company will extend their road in the manner pointed out, we on our part will furnish whatever is payable on 1250 shares in the capital stock, and we will secure the right of way free of expense to the company. That is to say, the contract was substantially conditional, and prospective, looking forward to an expected state of things. The company agreed to do certain things which required that certain legal disabilities should be first removed, and in the expectation that they would be so removed. This agreement they made at the request and upon the invitation of these defendants. The needful legislative sanction has been obtained; the road has been located exactly as requested by the defendants; the new stock has been created, subscribed for and paid up; and the road has been constructed, and is in daily and constant use. The right of way was not secured by the defendants according to their written proposal; and it was therefore arranged by a new agreement, that the company should go forward and secure that right, either by purchase or appraisal of the county commissioners, "without prejudice to the legal rights of either party named in said proposals."

The *bona fides* of the stipulation on the plaintiffs' part is not in dispute. It was in substance an agreement to do something not at that time legal, but which the passing of an expected statute would render legal; and both parties must have understood



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New Haven & Northampton Company v. Hayden.

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that, if the sanction of the legislature should be withheld, the contract would not go into effect. The contract does not import that the plaintiffs bound themselves to construct the road at all events and without legislative authority. Many cases have arisen in which contracts made in anticipation of such authority have been before the courts. Thus in *Scottish Northeastern Railway Co. v. Stewart*, 3 Macq. 382, a railroad corporation had bound itself to purchase land, if authority should be given by parliament. Lord Wensleydale, in rendering judgment, says: "No objection can, I think, be made, on the *ultra vires* doctrine, to a contract by a company who wish to alter one of the branches of their railroad, and are about to apply to parliament for authority to do so, engaging to purchase land from a neighboring proprietor, if they should obtain their act." In another case, Mr. Justice Erle says: "Although the works contracted for would have been unlawful without an act of parliament, still, if the parties intended to obtain the act before the works were done, they would not intend to violate the law when the contract was made, nor violate it by doing the works according to the act." *Mayor of Norwich v. Norfolk Railway Co.* 4 El. & Bl. 397, 410. So in *Taylor v. Chichester & Midhurst Railway Co.* Law Rep. 4 H. L. 628, where a like objection was taken, it was held that "an agreement, to arise and take effect on the passing of a bill then pending in parliament, is to be regarded, by virtue of that stipulation, as if it had been *de facto* made after the passing of the bill." And in a case in New Jersey, where a railroad had made a contract relating to business "upon any future extensions or branches," it was held that branches not then authorized, but subsequently allowed by the legislature, were included. *Sussex Railroad Co. v. Morris & Essex Railroad Co.* 4 C. E. Green, 13.

But the objection "on the *ultra vires* doctrine," whatever may be its weight, is not open to these defendants. The agreement of August 13, 1867, was made after that objection had been removed by the legislature, and may be said to admit the authority of the company to do what was stipulated to be done on its part in the acceptance of the proposals of January 26, 1866 or at least to recognize the existence of that earlier agreement.

In this view of the case, we think that the objection that the plaintiffs had no legal authority to extend their road, and that the agreement to do so is therefore void, is wholly untenable. It appears to us that upon the case presented by the report the plaintiffs have gone far enough to put the other party upon their defence. By the terms of the contract, the defendants were not to be bound unless they could secure the taking of the amount of stock above named, and also the right of way, or make such arrangement in regard to the same as should be satisfactory to the company. As the answer which they have filed is silent with regard to the stock, it must be inferred that so much of the contract as relates to that item has been fulfilled; and the case has proceeded upon that assumption upon both sides. The answer insists, however, that the defendants have not been able to secure the right of way, or to make any satisfactory arrangement therefor. It appears to us that this suggestion belongs to an affirmative defence, upon which the burden of proof rests upon the defendants. A stipulation that a promise is not to be binding upon the happening of some future event is equivalent to saying that it is defeasible on a condition subsequent, and the promisor must show that the event has happened. They were bound to secure the right of way if they could; and their failure to do so, after suitable efforts, could only be matter of excuse. It is a sufficient foundation for the plaintiffs' case to show that the right of way was not secured. *Gray v. Gardner*, 17 Mass. 188. *Thayer v. Connor*, 5 Allen, 25. *Jennison v. Stafford*, 1 Cush. 168. What arrangements the defendants have attempted to make, what impediments they have met with, and whether they have made any, and what efforts to obtain the right, are matters peculiarly within their own knowledge, in relation to which the plaintiffs cannot be supposed to have definite information. As the report stands, it does not appear that the defendants have done anything whatever in relation to that part of their undertaking, and it was a mistake to rule that the action could not be maintained upon the facts which they offered to prove.

Upon this review of the argument, therefore, our conclusion is, that the

*Case must stand for trial.*

CITY OF SPRINGFIELD *vs.* SAMUEL HARRIS.

The abutters on a street entered into a contract with the city, which was about to pave it, that if the city would leave standing a row of trees in the middle of the street, and put curb stones around them for the purpose of protecting them, they would pay the cost of the curb-stones. *Held*, that the contract was legal, and binding on the abutters.

On an issue whether a written contract between a city and an individual was delivered by the latter, evidence that he gave it to an agent with a request to deliver it to the mayor, and that the agent put it into the hands of the mayor, will warrant a finding that it was so delivered as to bind the principal, although the agent testifies that he put it into the mayor's hands only for the purpose of allowing him to inspect it, and with the expectation that he would return it to him; and evidence of declarations and previous propositions of the mayor is inadmissible to defeat the effect of the delivery.

A written proposition to pay for certain work, if the city would do it, was delivered to the city, and the city did the work. *Held*, that this was sufficient evidence of an acceptance by the city of the proposition, and that such acceptance was sufficient consideration for the promise to pay.

Several of the abutters on A. Street in a city signed an agreement to this effect: "Provided the city will place curb-stone around the trees in A. Street, we, the subscribers, agree to pay to the city the cost of the curb-stone so placed opposite our land on our side of the street." *Held*, that the city could maintain an action against one of the signers for the cost of the curb-stones put opposite his land, although it had not put curb-stones opposite the estates of all the signers of the agreement; and that the admission of evidence, at the trial, of the reasons why it did not put curb-stones opposite the estates of all the signers, was immaterial, and afforded the defendant no ground of exception.

In an action by a city against one of the signers of an agreement to pay for curb-stones around an inclosure if the city would lay them, it was contended in defence that the agreement was never delivered to the plaintiffs, and that an agent, to whom the person who had procured the signature of the defendant gave the agreement, put it in the hands of the plaintiffs' mayor merely for his inspection. *Held*, that evidence was admissible in reply, that the defendant said that he expected to pay for the work, until the city used the inclosure for rubbish; and that the person who procured the signatures gave the agreement to the agent for the purpose of its being delivered to the mayor, and would not have given it to him unless he had supposed that he would so deliver it.

CONTRACT on the following instrument, signed by the defendant and eleven others: "Springfield, April 22, 1869. Provided the city will place granite curb-stone around the large trees on North Main Street, for the purpose of protecting them, we, the subscribers, hereby agree to pay to the city the cost of the curb-stone so placed opposite our land on our side of the street." Writ dated May 28, 1870.

At the trial in the superior court, before *Pitman*, J., the plaintiffs' counsel, in his opening, stated that he expected to prove that the defendant with others petitioned the plaintiffs to macadamize

North Main Street, in Springfield, which was very wide and contained a row of large trees along its centre and a road on each side of them; that there were two plans presented to the plaintiffs for macadamizing the street, one, to cut down the trees and macadamize the whole width of the street, the other, to place granite curb-stones around the trees, for the purpose of protecting them, and macadamize on either side of them; that the expense of the latter plan exceeded the former by the cost of the curbing around the trees; that the plaintiffs were about to macadamize the street according to the former plan, when the defendant, together with the others whose names were signed to the agreement declared on, in consideration that the plaintiffs would macadamize the street according to the latter plan, executed and delivered the agreement to the plaintiffs; that the plaintiffs accepted the agreement, paved the street according to the second plan, and called upon the defendant to pay for the curbing placed opposite his land on his side of the street, but the defendant wholly refused to pay. On this statement the judge ruled that the plaintiffs could not recover; directed a verdict for the defendant; and reported the case by consent of the parties for the determination of this court; if the ruling was right, judgment to be entered on the verdict; otherwise, the case to stand for trial.

*E. B. Maynard & C. A. Winchester*, for the plaintiffs, cited *Crocket v. Boston*, 5 Cush. 182; *Foster v. Boston*, 22 Pick. 33; *Bell v. Boston*, 101 Mass. 506.

*A. L. Soule*, for the defendant. The plaintiffs had no power to make the contract declared on. Gen. Sts. c. 18, §§ 9, 10. In determining the laying out and altering of streets they act in a judicial capacity. *Parks v. Boston*, 8 Pick. 218. Any determination to lay out or alter a street in consideration of an agreement by an individual to pay the expenses would be void. *Commonwealth v. Cambridge*, 7 Mass. 158. *Commonwealth v. Sawin*, 2 Pick. 517.

GRAY, J. The improvement of the surface of the street was a mere act of ordinary repair, not requiring any new location or change of grade. The leaving of a row of shade trees in the middle of the highway, and the placing of granite curb-stones

around them, "for the purpose of protecting them," were done by the city at the request of the defendant and other abutters, and in consideration of their promise to pay the expense of such curb-stones opposite their lands, and do not appear to have made the street less fit for public travel. No illegality is shown in the agreement sued on, nor any reason why, having been performed on the part of the city, it should not have been performed on the part of the defendant.

*Case to stand for trial.*

At the new trial, before *Brigham*, C. J., it appeared that the trees stood in a line extending along the middle of North Main Street for a distance of about twelve hundred feet, from a point at the north a few feet south of Carew Street, across Holyoke Street and Clinton Street, to a point about two hundred feet south of the south line of the latter street; that North Main Street was thirty-three feet wide between the curbing and the walk on the west side, thirty feet wide between the curbing and the walk on the east side, and ninety-five feet wide from fence to fence; that the defendant's estate was immediately south of Holyoke Street, and was about sixty-six feet wide on North Main Street; that a petition, signed by the defendant and some others of the signers of the instrument declared on, that North Main Street should be macadamized, and granite curbing placed around the large trees on the street for the purpose of protecting them, was presented to the city council, and referred to the committee on streets and sidewalks, which reported that in its opinion the street should be macadamized from Congress Street, which was south of the trees, to Carew Street, and that the trees ought to be protected with suitable curbing, the expense of the curbing to be borne by the abutters, and recommended that the whole matter be referred to the supervisors of highways, with power to act; that the report of the committee was accepted in both branches of the city council, on April 26, 1869; that the plaintiffs did not place granite curb-stones around all the trees referred to in the instrument declared on, but did place such stones around the trees south of Carew Street and north of Holyoke Street, in one inclosure, and around those south of Holyoke Street

and north of Clinton Street, in another inclosure, and did not place any curb-stones around the trees south of Clinton Street, two in number; and that the land of the last signer of the instrument was south of Clinton Street, and opposite the trees about which no curb-stones were placed.

The city clerk testified that he found the instrument declared on among the papers of his office; that he saw the defendant December 4, 1871, and asked him to pay his bill; and that the defendant said he was short of money but would pay the bill soon, and had made the same promise on the same application previously.

A supervisor of the highways testified that the mayor, since deceased, showed him the instrument declared on; that he never saw it at any other time; and that he thought no curbing would have been set, if the instrument had not been signed; that the supervisors of highways did not put curbing around those of the trees which stood south of Clinton Street, because they thought it would be an impediment to travel to put it there, that if it had been done it would have been an impediment to travel near the head of Clinton Street, and that the largest tree not curbed was somewhat decayed. The defendant objected to the admission of any evidence as to why the curbing was not put around all the trees, or as to the effect of it if it had been placed; but the judge admitted the evidence. The witness further testified that he himself, with the mayor and a third person, were supervisors, and he was also one of the committee on streets and sidewalks; that they met the abutters in reference to the trees, and not putting curbing around all the trees, where it would interfere with travel, and on the subject of cutting some of the trees down. He did not testify that the defendant was present at any of those meetings or hearings.

It was admitted that the instrument was never presented to the city council for acceptance, or in any way; and there was no evidence that it was ever presented to the board of supervisors at any meeting thereof, or that it was accepted by them, or that it was accepted by the plaintiffs, unless acceptance is to be inferred from what the plaintiffs did in placing curb-stones about the part

of the trees referred to, or from the hearings and meetings testified of by the supervisor.

John Clark, called as a witness for the defendant, testified that he obtained several of the signatures on the instrument, and signed it himself; that he told the signers, when getting their signatures, that the instrument would not amount to anything and would not be used, unless all the abutters on the street opposite the line of the trees should sign it; that he found it impossible to get all to sign, and several of them refused to sign when he applied to them; that, six weeks or more after he first had the instrument in his hands to solicit signatures, he was asked by the mayor how the matter was getting on, and replied that it was of no use, and he could not get the signatures of the abutters, and had given it up; that the mayor asked who had refused, and he told him their names; that, about a week later, the mayor meeting him in the street said, "I wish you would bring down that paper and let me see it;" and that in consequence of this request, and in compliance with it, he let the mayor take the instrument declared on. The defendant offered to prove, by this witness, that the instrument was drawn up and circulated for signatures at the suggestion of the mayor, who stated to the witness and others of the abutters on the street opposite the line of trees, that if all the abutters would undertake to pay the cost of the stone for the curbing about the trees, each undertaking to pay the cost of the stone opposite his land on his side of the street, he thought the plaintiffs would lay the stone; that several of the abutters refused to sign, and the witness therefore abandoned the attempt to get the instrument signed by all, and put it away among his old papers at his house, some time before the mayor asked about it, as stated in his testimony. But the judge rejected the offered testimony. It appeared that no person signed the instrument after it went into the possession of the mayor, and that there were several abutters on each side of the street opposite the line of trees, who had never signed it, but that it was signed by abutters on each side.

Peter Patton, a witness called by the plaintiff, testified that he drew up the instrument; that he obtained the signature of the

defendant thereto, and the signatures of all who signed above the defendant, and the signature of the last signer; that he told the defendant he thought the instrument would not accomplish anything, and the city would not put in the curbing, unless all, or about all the abutters on the street, opposite the line of trees, should sign; and that the defendant signed the instrument before it went into the hands of Clark.

The defendant testified that Patton brought the instrument to him for signature, saying that, if all the abutters would pay for the curb-stones, the plaintiffs would have them put in; and that the defendant replied that if all the abutters would pay their proportions he would, and so signed the paper. In this he was contradicted by Patton. He further testified that when he talked with the city clerk he did not know that all the abutters had not signed the instrument; and that he did not know till the suit was begun that the instrument had ever been given to the mayor. On cross-examination he testified that he saw the curb-stones laid and made no objection; that he might have heard that some of the abutters had refused to sign; and that he did not know the state of the paper, made no particular inquiries about it, and supposed they had not all signed.

After the defendant had closed his case, the plaintiffs called Matthew Allis, who was allowed, against the objection of the defendant, to testify that about two months before the trial the defendant told him that he had expected to pay for the curbing, till the city used the inclosure for depositing rubbish and the street railway company put their timber on it. The plaintiffs also recalled Patton, who was allowed, against the objection of the defendant, to testify that he asked Clark if he would give the instrument to the mayor; that he thought Clark said he would; and that, if he had not supposed that Clark would give it to the mayor, he would not have given it to Clark. Clark, being recalled, testified that he had no recollection of any request from Patton to him to give the instrument to the mayor. There was no evidence in the case touching the question of the delivery of the instrument to the plaintiffs, except what is stated above.



The defendant asked the judge to rule "that there was no evidence of a delivery to the plaintiffs of the instrument declared on; that there was no evidence of acceptance by the plaintiffs of the proposal contained in the instrument; that the supervisors of highways had not any power or authority to make any contract with the defendant; that even if the instrument had been properly delivered, and the proposal accepted by the plaintiffs, no claim thereunder arose against the defendant, because the plaintiffs had not done what the contract called for on their part; that there was no performance of the contract by the plaintiffs, because they did not put curbing around all the trees referred to in the instrument; that the contract was a joint contract, and there was no liability on the part of any of the signers unless all were liable; that the instrument declared on was signed without consideration; and that, if there was any consideration for it, it failed by the failure of the plaintiffs to perform, on their part, what the instrument called for."

The judge refused so to rule, and instructed the jury as follows: "This action may be maintained upon proof, by a preponderance of evidence, of the fact that the defendant signed the agreement, that the same was delivered to the plaintiffs, and that the plaintiffs caused curbing to be placed around all the trees on North Main Street in front of the defendant's estate. The possession by the plaintiffs of the agreement when this action was commenced, and its production at the trial by the plaintiffs from their records, would be *prima facie* evidence of its delivery to them, but this evidence would be controlled by evidence that it came to the possession of the plaintiffs by delivery to the mayor upon the request of the mayor to inspect it, by a person, one of its signers, rightfully in the custody, who delivered it to the mayor merely for the purpose of enabling him to see the names of the persons who signed it. One of the signers had no authority to direct its delivery to the mayor, so as to affect the rights of any other signer of it who signed it on condition that it should not be used or so delivered unless all the abutters on North Main Street having estates in front of the trees signed it. If the defendant signed it unconditionally as to the signing of others

of the abutters, or as to its use or delivery of it, and thereupon it was delivered by the person who obtained his signature to the mayor absolutely, it is binding upon the defendant as if he was the only signer of it. The failure of the plaintiffs to place curb-stones around all the trees on North Main Street referred to in the agreement, because the curbing of the trees around which curbing was omitted would tend to affect injuriously the public convenience and safety of North Main Street, or for any other reason, would not be a defence to this action; nor would the fact that all the abutters having land fronting the trees referred to in the agreement did not sign it be a defence, unless the signing of all of them was a condition of the defendant's signing the agreement, and an expectation of such signing by all would not be a condition. If the defendant signed the agreement, without condition or reservation as to its use or delivery if it was not signed by other abutters on North Main Street having land in front of the trees, the person procuring his signing might deliver the agreement to the plaintiffs, and its acceptance by them would cause the defendant to be bound by it as his contract. The delivery of this agreement by the defendant to Patton, after the defendant signed it, if he signed it without reservation or condition as to its future use or delivery to the plaintiffs, authorized Patton to deliver it to the mayor, and if Patton thereupon requested or directed Clark to deliver it to the mayor and afterward Clark put it into the hands of the mayor, these facts would warrant a finding that it was delivered to the plaintiffs with the defendant's consent, and was so delivered as to affect him and bind him as and for a delivery of his contract. This finding would be warranted notwithstanding Clark put the agreement into the hands of the mayor for the purpose alone of affording the mayor an opportunity to inspect it, at the mayor's request, and with the expectation that the mayor, after inspecting it, would return it to him. The delivery of the agreement to the mayor, and the acts of the plaintiffs, as indicated by the records of official proceedings in the case, followed by the curbing of a considerable number of the trees referred to under the agreement, warrant the inference that the plaintiffs accepted the agreement and acted upon it."

The jury returned a verdict for the plaintiffs, and the defendant alleged exceptions, which were argued at September term 1872.

*A. L. Soule & E. H. Lathrop*, for the defendant.

*W. L. Smith & E. B. Maynard*, for the plaintiffs.

COLT, J. 1. There was evidence which would warrant the jury in finding that the defendant's agreement was delivered to the officers of the city. Whether the paper was handed to the mayor for inspection only, or was delivered to him by one to whom authority was originally given or whose act was subsequently ratified, was a question of fact upon all the conflicting evidence in the case. The instructions upon this point gave the defendant the benefit of all the evidence in his favor, and were apt and sufficient for the trial.

2. The records and official proceedings of the city, and the curbing actually completed, sufficiently prove that the defendant's proposition was accepted and that the work was done under it. It was not necessary that the city council should accept the proposition by formal vote. The fact that the work was done, so far as necessary to secure the conditions of the defendant's liability, and was done by the authorized agents of the city after the delivery of the agreement, was evidence of an acceptance, and furnished a sufficient consideration for the defendant's promise. *Crocket v. Boston*, 5 Cush. 182.

3. The defendant's contract did not require that the city should place curb-stones around all the trees on North Main Street. The contract, interpreted with reference to the nature of the work contemplated, is not a joint contract, but imposes upon each abutter a liability like the well known liability for similar street improvements, by which each pays for the work done opposite his estate. Its terms cannot be construed as requiring that the entire work proposed should be finished, as a condition precedent to the right to recover of any abutter for the work done against his premises. There was no error in the ruling of the court in this respect.

4. The defendant's exceptions to the admission and rejection of evidence cannot be sustained upon the case as shown by this record. The statement of the supervisors as to the reason for not

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*Hendrick v. West Springfield.*

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inclosing the trees at the southern end of the line, and as to the effect which would have been produced by inclosing them, was at most immaterial, as we view this contract, and could not prejudice the defendant. It does not appear that the testimony of the witnesses, who were called by the plaintiff after the defendant's case was in, was not admissible, either in reply, or within the discretion given to the court to regulate the order of proceedings at the trial. The declarations and previous propositions of the mayor, to other parties, were inadmissible, either to explain the meaning of the agreement or to defeat the effect of an authorized delivery of it.

*Exceptions overruled*

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**GEORGE W. HENDRICK vs. INHABITANTS OF WEST SPRINGFIELD.**

A statute for the construction of dikes in a town under the supervision of the county commissioners provided that the expense should be borne partly by the town and partly by the owners of land benefited thereby; that the collector of the town should collect the assessments on the landowners; and that "the assessments, when collected, shall be paid to the treasurer of the town, and after such payment and the construction of the dikes have been approved by the commissioners, the town shall be liable for all expenses lawfully incurred for such construction, and any person or persons to whom money may be due for labor or materials furnished upon any contracts with the commissioners, or by their order, may recover the same of the town in an action of contract." *Held*, that the town was not liable to a person who had constructed the dikes, and received from the commissioners an order on the treasurer of the town for payment, until the assessments were collected, and was not chargeable with interest before that time.

CONTRACT on an agreement made by the plaintiff with the county commissioners for the construction of two dikes in the town of West Springfield under the St. of 1868, c. 80. In the superior court the facts were agreed and judgment ordered thereon for the defendants; and the plaintiff appealed. The case is stated in the opinion.

*M. P. Knowlton, (G. M. Stearns with him,)* for the plaintiff.

*H. Morris,* for the defendants.

MORTON, J. The only question in this case is, as to the liability of the defendants for interest upon the amount for which

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the plaintiff agreed to construct the dikes. The contract makes no provision for interest. It provides that, as soon as possible after the completion of the dikes, the county commissioners shall give to the plaintiff, in accordance with the act authorizing their construction, an order upon the treasurer of the town of West Springfield for the amount due according to the terms of the contract. It specifies no time for the payment of the money.

The liability of the town is created by the St. of 1868, c. 80. This statute authorizes the commissioners to construct two dikes in West Springfield, to determine what portion of the expense thereof shall be borne by the town, and what portion by the owners of land benefited thereby, and to appoint three assessors, who shall assess, equitably and ratably, upon the owners of such land the portion to be borne by them. It is made the duty of the collector of the town to collect the assessments so made. The seventh section provides that "the assessments, when collected, shall be paid to the treasurer of the town, and after such payment and the construction of the dikes have been approved by the commissioners, the town shall be liable for all expenses lawfully incurred for such construction, and any person or persons to whom money may be due for labor or materials furnished upon any contracts with the commissioners, or by their order, may recover the same of the town in an action of contract."

Under this statute, it is clear that the town is not liable for the amounts assessed upon the owners of land benefited by the dikes, until such amounts are collected and paid to the town treasurer. It is "after such payment" that the town is to be liable. Before such payment, it is not bound, and indeed is not authorized, to pay such amounts out of the general treasury. It follows that, in the case at bar, the town was not in any default in not paying these amounts until they were collected, and is not liable for interest thereon.

This is the only question submitted to us, the parties agreeing that if the court should adopt this view of the law the judgment of the superior court was correct.

*Judgment affirmed.*

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McGregory v. Gregory.

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**EBENEZER MCGREGORY vs. EBENEZER P. MCGREGORY & others.**

One who put his name on the back of a note, as guarantor before delivery, paid the amount of it to the payee, who indorsed and delivered it to him. *Held*, that he could declare on the note as indorsee, without alleging that he was guarantor.

An allegation that a note is lost is supported by proof that it has been destroyed by fire.

An action may be maintained against all the makers of a joint promissory note alleged to be lost, upon filing a sufficient bond of indemnity before judgment.

One of two joint payees and indorsers of a dishonored promissory note paid half of the amount of it to the other payee, who took up the note, indorsed the payment upon it, and, in a suit upon it against the makers, recovered judgment against them for the balance. *Held*, that the first named payee could also maintain an action against them for the amount paid by him, as money paid to their use.

**CONTRACT** against Ebenezer P. Gregory, Daniel N. Stanton and John C. Stanton. The declaration contained six counts; the first on a promissory note for \$70 made by the defendants, payable to the plaintiff or order; the second and third respectively on promissory notes for \$500 made by the defendants, payable to Levi Johnson or order, and by him indorsed to the plaintiff; the fourth on a promissory note for \$500 made by the defendants, payable to Lot W. Crane or order, and by him indorsed to the plaintiff; (each of these three last counts contained an allegation that the plaintiff was unable to annex a copy of the note for the reason that it had been lost;) the fifth on a promissory note for \$700 made by the defendants, payable three months after date to the order of the plaintiff and Rufus G. Pinney; (the count alleged that the plaintiff and Pinney indorsed this note for the accommodation of the defendants, that the defendants neglected to pay it at maturity, of which the plaintiff and Pinney had due and lawful notice, and that the plaintiff, as joint indorser, was compelled to pay and did pay upon the note, for the benefit of the defendants, the sum of \$350 and interest;) the sixth for \$350 paid by the plaintiff for the defendants' use and at their request; (the bill of particulars to this count alleged that the money was paid "to take up the defendants' note at the Monson Bank.") Gregory was defaulted; the Stantons defended the action.

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McGregory v. McGregor.

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At the trial in the superior court, before *Rockwell, J.*, no question was made of the plaintiff's right to recover upon the first count.

In support of the second, third and fourth counts, the plaintiff was allowed to testify, against the objection of the defendants, that the defendants made two notes, each for \$500 and payable to Levi Johnson or order; that the plaintiff, for the accommodation of the defendants, put his name upon the backs of the notes after they were signed by the defendants; that the notes were then delivered to Johnson; that on the day they fell due the plaintiff went to Johnson and paid them, and Johnson indorsed them to him; that the defendants made another note for \$500, payable to Lot W. Crane or order; that the plaintiff, for the accommodation of the defendants, put his name upon the back of it after it was signed by the defendants; that the note was then delivered to Crane; that a few days before it fell due the plaintiff paid the amount of it to Crane, and Crane indorsed it to him; and that he took all three notes to his home, where they were destroyed by fire. The defendants contended that the plaintiff could not recover on this evidence, because it tended to show that the notes were not lost, as alleged, but destroyed; that the notes testified to by the plaintiff were substantially different from those set forth in the declaration, were known by him to be different, and did not support the declaration; and that he was an original promisor or guarantor, and could not recover for any money paid by him, as such payment was voluntary. They also contended that no action at law could be maintained to recover the amount of promissory notes alleged to be lost, but that the plaintiff's remedy was in equity, and that, at any rate, no action at law could be maintained, unless before the beginning of the suit a demand was made upon the makers, and a reasonable indemnity offered them in case of payment. But the judge ruled that the plaintiff's testimony, if believed by the jury, would entitle him to a verdict on the second, third and fourth counts.

In support of the fifth and sixth counts the plaintiff introduced testimony tending to prove "that the defendants made the note therein described; that the plaintiff and Rufus G. Pinney, the

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McGregory v. McGregor.

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payees, jointly indorsed it for the accommodation of the defendants; that the latter obtained a discount of it at the Monson Bank; that, within a day or two after the making of it, the plaintiff gave to Rufus G. Pinney \$350 to be applied towards the payment of it, requesting him to take it up; that Rufus G. Pinney took up the note at the bank and remained in the possession of it until his death, indorsing said payment upon the note; that upon his death Andrew Pinney became his administrator, succeeded to the possession of this note, and subsequently brought a suit thereon against these defendants; and that a judgment was recovered by the plaintiff in that suit, which was paid by the defendants." It appeared from the record of the suit, that the judgment was for only \$350 and interest.

The plaintiff also testified in relation to this note as follows: "I received a notice, I cannot tell what the notice was; it was a notice from a bank that the note fell due such a day, and I was requested to pay it. I took a horse and went to the bank. They were going to collect the note by law. The notice was, that a note signed by me and Andrew Pinney was due such a day, and payment was requested. I think I received the notice before the note became due. As I recollect, the notice was that the note would be due in a few days, and I was requested to pay it. I do not recollect whether I received the notice before or after the note fell due. It may have been on the same day and notifying me to pay the note." He further testified that "on the day the note fell due he was at the post-office and received a notice from the bank that the note aforesaid remained unpaid and they required him to pay the same."

The defendants requested the judge to rule that the plaintiff could not recover under either of these counts, because "the judgment and satisfaction in the case of Pinney against these defendants, he being the lawful holder of the note, was a satisfaction of and bar to the plaintiff's claim, and because the foregoing testimony, if believed by the jury, would not authorize them to find that any legal demand was ever made for the payment of the note, or any legal or sufficient notice given to the indorsers, and that consequently any payment made by the plaintiff thereon was



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voluntary and in his own wrong." But the judge refused so to rule, and ruled that the foregoing testimony, if believed by the jury, would entitle the plaintiff to recover.

Under these instructions the defendants waived any issue of fact to the jury, and a verdict by the order of the judge was returned for the plaintiff on the first, second, third, fourth and sixth counts. After verdict, the plaintiff filed a bond for the protection of the defendants from liability on the lost notes, to the approval of the judge; and the judge reported the case for the determination of this court. If all the foregoing rulings and instructions were correct, then judgment was to be entered upon the verdict, for the full sum found; if not, then upon such counts as in the opinion of the court the plaintiff should be entitled to recover upon.

*E. Merwin*, for the Stantons.

*G. M. Stearns & M. P. Knowlton*, for the plaintiff.

GRAY, J. 1. No question is made of the plaintiff's right to recover upon the note set out in the first count of the declaration.

2. As to the notes described in the second, third and fourth counts, the plaintiff, although a guarantor, had the same right as any other person to take them up by paying the amount thereof to the holders and having them indorsed to himself. *Pinney v. McGregor*, 102 Mass. 186. Those counts state a good title in him as indorsee, and the omission to allege that he was also a guarantor is immaterial.

3. Destruction by fire is one mode by which property may be lost, and an allegation that a note has been lost is fully supported by proof that it has been destroyed by fire.

4. It is well settled in this Commonwealth, that an action at law may be maintained on a lost promissory note, whenever a bond of indemnity will afford complete protection to the defendant; and that such an action may be maintained against the maker of such a note, upon filing a sufficient bond of indemnity. All the makers of the notes described in these three counts are defendants in this action; and they do not stand like an indorser of a promissory note, who is entitled, upon taking it up, to the possession thereof, in order that he may have his recourse over

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 Clark v. Nichols.
 

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against the maker, or negotiate it again ; or like the acceptor of a bill of exchange, who may need it as a voucher in settling his account with the drawer. *Fales v. Russell*, 16 Pick. 315. *Almy v. Reed*, 10 Cush. 421. *Boston Lead Co. v. McQuirk*, 15 Gray, 87. *Tower v. Appleton Bank*, 8 Allen, 387. *Tuttle v. Standish*, 4 Allen, 481. *Savannah National Bank v. Haskins*, 101 Mass. 370.

5. Upon the plaintiff's claim for money paid on the note indorsed by himself and Pinney, the defendants did not ask to have any question of fact submitted to the jury. The plaintiff's testimony, (though somewhat confused,) taken in connection with the record of the action brought by Pinney against these defendants, showing that they had the benefit of the amount paid by this plaintiff upon the note, would warrant the jury in finding, as against them, that that amount was paid by the plaintiff by the hand of Pinney after the note had been dishonored and due notice thereof given to the indorsers and demand of payment made upon them. The plaintiff is therefore entitled to recover that amount as money paid to the defendants' use. The judgment recovered by Pinney on the note was no merger of this cause of action. *Pownal v. Ferrand*, 6 B. & C. 439; *S. C.* 9 D. & R. 608. *Butler v. Wright*, 20 Johns. 367, and 6 Wend. 285.

*Judgment on the verdict for the plaintiff.*

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### RODOLPHUS C. CLARK vs. WILLIAM NICHOLS.

An oral contract for the delivery of a certain number of feet of plank by A. to B. for the price of more than fifty dollars is a contract for the sale of goods within the statute of frauds, although it is stipulated that A. shall "saw the logs into plank of various dimensions under B.'s direction."

CONTRACT to recover damages for nonperformance of an oral agreement, by the terms of which the defendant was to deliver to the plaintiff 15,000 feet of ash bending-stuff, for the price of \$34 per 1000 feet, and 15,000 feet of ash plank, for the price of \$25 per 1000 feet, before July 1, 1869. The answer set up the statute of frauds.

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Dickinson v. Lane.

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At the trial in the superior court, before *Pitman*, J., the plaintiff testified to the contract as above set forth; and also that bending-stuff was the butts of trees sawed so as to render them suitable to be manufactured into wagon shafts, and that "the defendant was to saw all the logs not suitable for bending-stuff into plank of various dimensions, under the direction of the plaintiff." The judge ruled that the action could not be maintained, and directed a verdict for the defendant, which was returned; and the plaintiff alleged exceptions.

*A. M. Copeland*, for the plaintiff, besides cases referred to in the opinion, cited *Edwards v. Grand Trunk Railway Co.* 48 Maine, 379; *Hight v. Ripley*, 19 Maine, 137; *Finney v. Appar*, 2 Vroom, 266.

*G. M. Stearns*, (*M. P. Knowlton* with him,) for the defendant.

CHAPMAN, C. J. As the contract is stated in the bill of exceptions, we think it was a contract to sell and deliver the bending-stuff and plank, and not a contract for labor in manufacturing the articles. It is not therefore like the cases of *Mixer v. Howarth*, 21 Pick. 205, and *Spencer v. Cone*, 1 Met. 283; but like *Gardner v. Joy*, 9 Met. 177; *Lamb v. Crafts*, 12 Met. 358; and *Waterman v. Meigs*, 4 Cush. 497; and was within the statute of frauds.

*Exceptions overruled.*

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### ISAAC P. DICKINSON vs. WILLIAM H. LANE.

Under a declaration for money had and received, with a bill of particulars for money paid for a horse sold by the defendant to the plaintiff with a warranty, and returned by the plaintiff for breach of the warranty, the plaintiff cannot recover upon proof of a rescission of the contract and return of the horse by him to the defendant.

CONTRACT for money had and received. The bill of particulars filed with the declaration was as follows: "William H. Lane to Isaac P. Dickinson, Dr. June 17, 1870. For cash paid by the plaintiff and received by the defendant for horse sold by the defendant to the plaintiff, with warranty, and returned by the plaintiff to the defendant for breach of warranty, \$117."

At the trial in the superior court, before *Rockwell, J.*, it appeared that the plaintiff purchased the horse, and returned it to the defendant on the day following the sale. There was conflicting evidence as to the warranty and the breach. The plaintiff introduced evidence tending to show that, after the return of the horse, the defendant asked him why he had returned the horse; that he replied that the horse was unsound, and demanded the return of the money paid for it; and that the defendant promised to send the money to him next day, but failed to do so.

The plaintiff requested the judge to instruct the jury "that even if there was no warranty, or if there was a warranty and no breach, yet if, after the plaintiff had returned the horse to the defendant and the defendant was notified by the plaintiff of the reasons, the defendant promised to repay him the money he had paid for the horse, then there was such a rescission of the contract that the plaintiff was entitled to recover the price paid for the horse." But the judge declined so to instruct the jury, and ruled that, "under the pleadings, the plaintiff could not recover unless the jury were satisfied that there was a warranty which was broken." The jury returned a verdict for the defendant, and the plaintiff alleged exceptions.

*H. Morris*, for the plaintiff.

*G. M. Stearns*, (*M. P. Knowlton* with him,) for the defendant.

AMES, J. The plaintiff's declaration (of which the bill of particulars must be considered as a part, — Gen. Sts. c. 129, § 10) charges that the defendant warranted the horse, and that the warranty was broken. He rests his claim to recover back the purchase money upon no other ground. Upon the case presented by the declaration, if there was no warranty or no breach, the money was properly paid, and in equity and good conscience belonged to the defendant. *Stone v. Knight*, 23 Pick. 95. The ruling which the plaintiff requested the court to make was substantially that he should be excused from proving the vital elements of his case, as he had seen fit to present it for trial. A subsequent agreement to rescind the original contract, and return the money, was an entirely different matter, of which the declara-

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Rice v. Mayo.

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tion gave no intimation, and plainly was not allowable as a ground of claim in this action without an amendment. The ruling requested was therefore rightly refused.

*Exceptions overruled.*

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CHARLES W. RICE & another vs. AMAZIAH MAYO.

In an action by a real estate broker on an agreement to pay him a commission upon the sale of an estate, the plaintiff contended that he was to have the commission whether the sale was effected by him or not, and the defendant contended that the plaintiff was to have the commission only in case the sale was effected by him. *Held*, that the defendant could not introduce evidence that after the agreement with the plaintiff he promised another broker to pay him a commission to effect a sale.

A written contract for the purchase of an estate, binding both vendor and purchaser, is a sale within the meaning of an agreement to pay a commission to a broker upon sale of the estate.

CONTRACT on an alleged agreement that if the plaintiffs, who were real estate brokers, would endeavor to sell a parcel of land on State Street in Springfield, belonging to the defendant, for a certain sum, the defendant would pay them a commission of one per cent. on said sum, whenever the land should be sold, whether sold through the aid of the plaintiffs or not. Writ dated May 9, 1870.

At the trial in the superior court, before *Pitman, J.*, Robert F. Hawkins was called as a witness by the plaintiffs, and produced the following writing signed by him and the defendant :

"Memorandum of agreement by and between R. F. Hawkins and Amaziah Mayo, this 5th day of April 1869, witnesseth : R. F. Hawkins hereby becomes the purchaser of the State Street property in Springfield belonging to said Mayo, for which he is to pay \$20,000, \$500 down and \$4500 one year from date ; Mayo on his part hereby agreeing to give to said Hawkins a deed of said property whenever within one year he makes up the payments to \$5000, and agrees to carry \$15,000 on a mortgage on the property for a term of years at seven per cent. semi-annual interest. Hawkins is to take immediate possession, and is to pay all the taxes and insurance on the property to said Mayo, until

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Rice v. Mayo.

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he takes his deed, and also agrees to pay quarterly to said Mayo a sum which will net said Mayo seven per cent. interest on the \$20,000 purchase, until Hawkins takes his deed. The gas fixtures which Hawkins puts in shall be his own personal property in any event."

Hawkins testified that he paid the "\$500 down" by a promissory note which was paid within the year, and that nothing more was paid within the year on the agreement or toward the price named therein; that he never took a deed of the land, but that the defendant conveyed the land to Hawkins's wife by deed dated June 9, 1870, and that "the deed was made to my wife by my direction, and by Mayo's consent, and it was in fact my purchase." It was admitted that there was no sale of the land before this action was commenced, unless the facts testified to by Hawkins amounted to a sale.

The defendant testified that his contract with the plaintiffs was to pay them a commission only in case they brought him the customer to whom the place should be sold; and for the purpose of showing that he did not make the contract alleged by the plaintiffs, he offered to prove that, after he made his contract with the plaintiffs, and before the bargain of April 5, 1869, he agreed with John Clark, a real estate broker, to pay him a commission of one per cent. on the price of the estate, if Clark should bring him a customer. But the judge excluded the evidence.

The defendant requested the judge to rule that no sale of the estate, within the meaning of the contract with the plaintiffs, was effected before the action was begun. But the judge refused so to rule, and ruled that there was evidence from which the jury might infer a sale within the meaning of the contract relied on by the plaintiffs.

The jury returned a verdict for the plaintiffs, and the defendant alleged exceptions.

*A. L. Soule*, for the defendant.

*M. P. Knowlton*, (*G. M. Stearns* with him,) for the plaintiffs.

GRAY, J. If the agreement was as contended by the plaintiffs, they were entitled to a commission if they endeavored to sell the defendant's land, and a sale was afterwards effected, either

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Fowler v. Strickland.

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with or without the aid of the plaintiffs and evidence that the defendant afterwards employed another broker to sell the land was immaterial, either upon the construction of such an agreement, or to prove what the agreement was. *Loud v. Hall*, 106 Mass. 404. A contract or memorandum in writing, binding both seller and purchaser, was a sale effected, within the meaning of the agreement on which the plaintiffs relied, although a formal deed had not been executed and delivered.

*Exceptions overruled.*

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CHARLES F. FOWLER vs. FRANCIS G. STRICKLAND & another.

B. indorsed A.'s promissory note payable on time to B.'s order, for A.'s accommodation; and A. negotiated it to C. for its full amount. At the maturity of the note, B., having been informed by A. that he could not then pay it, took it up, paying C. therefor half of the amount thereof. *Held*, that B. could recover the full amount of the note of A., in an action upon the note as payee.

CONTRACT, brought January 11, 1870, on a promissory note for \$2000, dated August 2, 1869, signed by the defendants, and payable to the plaintiff or order in four months from date. The declaration was in the usual form of an action by payee against maker.

At the trial in the superior court, before *Pitman, J.*, "it appeared in evidence that the note was an accommodation note; that the plaintiff indorsed it in blank as accommodation indorser, at the request and for the accommodation of the defendants, for the purpose of borrowing money for their use; and that, before the note became due, the defendants were reported to be insolvent, and their place of business was closed; also, that the note was negotiated by the defendants to Haswell Loomis for its full value, received in money on the same from Loomis; that, at or about the time of the maturity of the note, the plaintiff had a conversation with one of the defendants concerning payment of the note to Loomis, in which the plaintiff was informed by him that the defendants would not be able to meet the note at its

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Fowler v. Strickland.

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maturity, that the plaintiff would be obliged to pay it, and must pay it, but that he hoped that the defendants would be able to pay the plaintiff some time ; that soon after this conversation the plaintiff took up the note, giving Loomis in payment three promissory notes signed by himself and Royal Fowler, two for \$300 each, and one for \$400 ; and that the plaintiff paid no other consideration whatever for the note declared on.

“ Upon this evidence, the defendants requested the judge to rule as matter of law, that the plaintiff, who was the payee of the note declared on, and who indorsed said note as an accommodation indorser, could only recover the amount paid by him and interest. The judge refused so to rule, but instructed the jury that, if they believed from the evidence that the plaintiff was the holder of said note for value, the plaintiff was entitled to recover the whole note and interest.

“ The defendants also requested the judge to rule as matter of law, that the plaintiff could not recover under his present declaration, and should have declared specially. But the judge ruled that the declaration was sufficient, and the plaintiff could recover under it.”

The jury returned a verdict for the plaintiff for the whole amount of the note and interest ; and the defendants alleged exceptions, which were argued at this term, and afterwards reargued in writing before all the judges.

*H. Fuller*, for the defendants.

*M. B. Whitney*, for the plaintiff.

GRAY, J. The note sued on being an accommodation note, and the action between the original parties, the consideration was doubtless open to inquiry. But the note was made for the accommodation of the defendants, the makers ; not of the plaintiff, the payee and indorser. The defendants, upon negotiating to Loomis the note thus indorsed by the plaintiff for their accommodation, received from Loomis the whole amount of the note, and were responsible to an equal amount in an action on the note by Loomis or any lawful holder. The plaintiff had the same right as any other person to purchase the note from Loomis for such price as might be agreed on between them. Even if, by the terms of such



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*Fowler v. Strickland.*

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an agreement, Loomis had retained any interest in the proceeds of the note which he delivered to the plaintiff, the latter, in an action against the defendants on the note, could have recovered the full amount thereof, although he might have held a part of the proceeds in trust for Loomis. If he purchased the entire interest of Loomis in the note, at the time of its delivery by Loomis to him, he might recover the whole amount to his own use. The defendants having received the whole amount of the note at the time of its original negotiation, and being now no longer liable to any action by Loomis, the amount of their liability in this action against them as makers of the note is not affected by the question how much the plaintiff paid to Loomis, or whether the sum recovered will belong to Loomis or to the plaintiff. If the note had been made by the defendants for the accommodation of the plaintiff, a different case would have been presented. *Johnson v. Kennion*, 2 Wils. 262. *Reid v. Furnival*, 5 C. & P. 499, and 1 Cr. & M. 538. *Wiffen v. Roberts*, 1 Esp. 261. *Babson v. Webber*, 9 Pick. 163. *Ellsworth v. Brewer*, 11 Pick. 316. *Piney v. McGregory*, 102 Mass. 186. *McGregory v. McGregory*, ante, 548. *Allaire v. Hwtshorne*, 1 Zab. 665, 671.

*Exceptions overruled.*

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**CASES**

**ARGUED AND DETERMINED**

**IN THE**

**SUPREME JUDICIAL COURT,**

**FOR THE**

**COUNTY OF WORCESTER, OCTOBER TERM 1871,**

**AT WORCESTER.**

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**PRESENT:**

<b>HON. REUBEN A. CHAPMAN, CHIEF JUSTICE.</b>		
<b>HON. HORACE GRAY, JR.,</b>	}	<b>JUSTICES.</b>
<b>HON. JOHN WELLS,</b>		
<b>HON. SETH AMES,</b>		
<b>HON. MARCUS MORTON,</b>		

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**SAMUEL WALKER & others vs. MICHAEL CRONIN.**

An action of tort may be maintained upon a count which alleges that the plaintiff was a manufacturer of shoes, and for the prosecution of his business it was necessary for him to employ many shoemakers; that the defendant, well knowing this, did unlawfully and without justifiable cause molest him in carrying on said business, with the unlawful purpose of preventing him from carrying it on, and wilfully induced many shoemakers who were in his employment, and others who were about to enter into it, to abandon it without his consent and against his will; and that thereby the plaintiff lost their services, and profits and advantages which he would have derived therefrom, and was put to great expense to procure other suitable workmen, and compelled to pay larger prices for work than he would have had to pay but for the said doings of the defendant, and otherwise injured in his business.

An action of tort may be maintained upon a count which alleges that the plaintiff entered into contracts with certain shoemakers for them severally to make stock, which he delivered to them, into shoes, and return the shoes to his factory; that the defendant, well knowing this, with the unlawful purpose of preventing him from carrying on his business, induced ~~him~~ to return the stock unfinished to the factory, and to neglect and re-

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Walker v. Cronin.

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fuse to make it into shoes as they had agreed to do; and that the stock was thereby damaged, and the plaintiff put to trouble and expense in reasorting it and procuring it to be finished, and compelled to pay larger prices for the finishing of it than he would have done under said contracts, and by reason of the said unlawful doings of the defendant was hindered and put to expense and otherwise injured in his business.

An action of tort may be maintained upon a count which alleges that a certain shoemaker was in the plaintiff's service and employment on a specified day, and for a valuable consideration on that day agreed to make three cases of shoes for the plaintiff within one month; that the defendant, well knowing this, contriving to defraud the plaintiff of the profit and benefit of said service and of the performance of said contract, did on another day, specified as being before the expiration of the month, entice and procure the shoemaker, then being in the plaintiff's service, and before he had performed said contract, as the defendant well knew, to leave the plaintiff's service and refuse to perform the contract, without the plaintiff's leave and against the plaintiff's will, by means of which enticement the shoemaker on the last named day did leave said service and neglect and refuse to perform said contract, without the leave and against the will of the plaintiff; and that the plaintiff thereby lost profits and benefits which would otherwise have accrued to him from said service and by the performance of said contract.

TORT, brought in the superior court. The declaration was as follows:

*"First count.* And the plaintiffs say that before and at the time of the committing of the several grievances by the defendant, as hereinafter mentioned, they were, and from thence hitherto have been, engaged in the manufacture and sale of boots and shoes in the town of Milford in the county of Worcester, and have heretofore made, and ought and would have continued to make, large profits in their said business but for the said several grievances committed by the defendant; and they further say that in the prosecution of their said business it was necessary for them to employ, and they did employ, a large number of persons as makers of boots and shoes so manufactured by them, all which the defendant well knowing did on or about the 1st day of January 1869, and at divers times thereafter, and till the date of the plaintiffs' writ, with divers other persons whose names are unknown to the plaintiffs, unlawfully and without justifiable cause molest, obstruct and hinder the plaintiffs from carrying on said business, with the unlawful purpose of preventing the plaintiffs from carrying on their said business, and wilfully persuaded and induced a large number of persons, who were in the employment of the plaintiffs as bottomers of boots and shoes as aforesaid, and others who were about to enter into the employment of

the plaintiffs, and who were skilled in the art of bottoming boots and shoes, to leave and abandon the employment of the plaintiffs, without their consent and against their will ; whereby the plaintiffs lost the services of said persons so as aforesaid employed and about to be employed, and all the advantages and profits that they would otherwise have made and received from the service and employment of said persons ; and the plaintiffs incurred large expenses to procure other suitable workmen to take the places of those so induced to leave and abandon their employment, and were compelled to pay much larger prices for said work and labor of bottoming boots and shoes than they would otherwise have done, for the committing of said several grievances by the defendant and others, whose names are to the plaintiffs unknown, although said work and labor were of no greater value to them, and the enhanced prices they were compelled to pay as aforesaid were much greater than the usual market price for such work and labor ; and the plaintiffs have been compelled, by reason of the acts aforesaid of the defendant and the other persons aforesaid whose names are to the plaintiffs unknown, to pay much more for the manufacture of boots and shoes in other branches of said manufacture, and have been hindered in their business to a large extent, and prevented from manufacturing the quantity of boots and shoes that they would otherwise have manufactured, and in the manufacture of which they would otherwise have realized large profits, all which the defendant well knew.

*"Second count.* And the plaintiffs further say that before and at the time of committing the several grievances by the defendant, as hereinafter mentioned, they had made several contracts with a large number of persons skilled in the art of making boots and shoes, whose names are as follows : [here naming forty-five persons, including among them one Lyman L. Temple,] whereby said several persons had severally for valuable consideration agreed with the plaintiffs to make certain stock, duly assorted and delivered to them for that purpose by the plaintiffs, into boots and shoes for the plaintiffs, and to return the same, so manufactured into boots, and boots and shoes, to the factory of the plaintiffs in said Milford ; all which the defendant well knowing,

with the unlawful purpose of hindering and preventing the plaintiffs from carrying on their said business, did induce said persons to refuse and neglect to make and finish said stock into boots and shoes as they had agreed to do; and by the means aforesaid the defendant induced the said persons to return said stock wholly unmanufactured or in an unfinished condition, whereby said stock was greatly damaged, and the plaintiffs were put to great trouble and expense in reassorting said stock and in procuring the same to be made into boots and shoes, and were compelled to pay much larger prices for the making of the same than they would otherwise have paid to the said several persons with whom they had contracted as aforesaid, and by reason of the said unlawful acts of the defendant they wholly lost the benefit and profits of said contracts with the persons aforesaid, and by reason of the said unlawful acts and doings of the defendant great uncertainty and irregularity was caused in the prosecution of the aforesaid business of the plaintiffs, and they were greatly hindered and put to great expense in the prosecution of their said business, and in the manufacture of boots and shoes, and in the completion of the same for market, and they have been and are greatly injured in their aforesaid business and manufacture and sale of boots and shoes.

*“Third count.* And the plaintiffs say that one Lyman L. Temple, on or about the 19th day of January 1869, was in the plaintiffs’ service and employment, and at the time aforesaid for a valuable consideration made a contract with the plaintiffs to make for them certain boots and shoes, to wit, three cases of boots and three cases of shoes, within a reasonable time, to wit, within one month, all of which the said defendant well knew; yet the said defendant, contriving to defraud and deprive the plaintiffs of all the profits and benefits of the said service and of the performance of said contract, did on or about the 1st day of February 1869 entice and procure the said Temple, then being in the plaintiffs’ service, and before he had performed said contract, as the defendant well knew, without the plaintiffs’ leave and against their will, to leave the service of the plaintiffs, and to refuse to perform his said contract, by means of which enticement the said Temple afterwards, to wit, on the same day, left the plaintiffs’ service and

neglected and refused to perform his said contract, without the leave and against the will of the plaintiffs, whereby the plaintiffs lost the profits and benefits that would otherwise have accrued to them from said service and by the performance of said contract."

The defendant demurred, and specified the following causes of demurrer:

"1. That neither of the three counts states a legal cause of action substantially in accordance with the rules contained in the Gen. Sts. c. 129.

"2. That the acts alleged in the several counts to have been done by the defendant do not constitute a legal cause of action in favor of the plaintiffs.

"3. That it is not actionable, for the purpose alleged in the first count, for the defendant to persuade and induce, as alleged, the persons alleged to leave and abandon the plaintiffs' employment.

"4. That, as to the second count, it is not actionable for the defendant, for the purpose alleged, to induce the persons therein alleged to refuse and neglect to carry out the alleged agreement.

"5. That, as to the third count, it is not actionable for the defendant to entice and procure said Temple to leave the alleged service of the plaintiffs, and to refuse to perform his alleged contract, in manner and form as alleged.

"6. That there is no such relation shown between the plaintiffs and the persons alleged in the several counts to have been in their employment or about to enter their employment, as to make the alleged acts and conduct of the defendant in the premises unlawful."

The superior court sustained the demurrer, and the plaintiffs appealed.

*P. E. Aldrich & T. G. Kent*, for the plaintiffs, were first called upon.

*H. B. Staples*, (*C. Cowley & F. P. Goulding* with him,) for the defendant. 1. As to the first count. It does not appear that the persons who were induced to leave the plaintiffs' employment had not a perfect right to do so. *Commonwealth v. Hunt*, 4 Met. 111, 130. *Bowen v. Matheson*, 14 Allen, 499. *Campbell v.*

*Cooper*, 34 N. H. 49. *Hart v. Aldridge*, Cowp. 54. Nor does it appear that they were induced to leave by illegal means; and without such an allegation the count contains no cause of action. Cowp. 54. 4 Met. 126, 132.

Nor can an action be maintained upon the allegation that the defendant "persuaded and induced" persons who were about to enter the plaintiffs' employment to refrain from so doing, no illegal methods being stated. 4 Met. 111. See also the allegations held to be defective in 14 Allen, 499. And this allegation cannot be rejected as surplusage, for it may go to the whole damage, and is so closely connected with the charge of inducing persons actually in the employment to leave it, as to make one charge in substance. The allegation that the defendant did molest, obstruct and hinder the plaintiffs is limited and qualified by the specification that he "persuaded and induced." If regarded as an independent allegation, it also is insufficient in law for want of any allegation of the use of unlawful means. 4 Met. 134, 135.

*Winsmore v. Greenbank*, Willes, 577. *O'Neill v. Longman*, 4 B. & S. 376.

2. As to the second count. It contains more than one cause of action. Gen. Sts. c. 129, § 2, cl. 4. It does not appear that the persons specified in it were induced to refuse to perform their contracts by the use of any illegal means by the defendant. And the relation of master and servant, without which it cannot be sustained, did not exist between them and the plaintiffs. Cowp. 54. *Hilliard v. Richardson*, 3 Gray, 349. *Brckett v. Lubke*, 4 Allen, 138. *Forsyth v. Hooper*, 11 Allen, 419. *Coomes v. Houghton*, 102 Mass. 211.

3. As to the third count. The contract alleged between the plaintiffs and Temple did not create the relation of master and servant. See cases last above cited.

The allegations that he was in their employment and service, and was enticed to leave their service, are mere legal inferences as to the relation created by his contract, and do not constitute a substantive charge against the defendant; or they may be regarded as a general description of the cause of action more particularly set forth in the allegations concerning the contract, and

therefore as limited and explained by such allegations, or as a mere recital of the relation between the parties when the contract was entered into which terminated such relation. But even if the allegations of service and employment, and enticement therefrom, be considered substantive, independently of all reference to the contract, then the first proposition maintained by the defendant as to the first count, and the cases cited in its support, apply to this count also.

The defendant is alleged to have enticed Temple to refuse to perform his contract before the time agreed on for its performance had arrived; and Temple's refusal to perform it is alleged to have taken place at the same time. The count only states that on or about the 1st of February, by the enticement of the defendant, Temple refused to perform a contract under which his right of performance extended to the 19th of February, whereby it alleges that the plaintiffs lost the benefits that would have accrued from its performance on the 1st of February. If the statement be correct, no legal cause of action existed at the time of the enticement. *Bird v. Randall*, 1 W. Bl. 373.

The allegation "contriving to defraud," &c., is mere recital, and not traversable. 4 Met. 123. *Commonwealth v. Walden*, 8 Cush. 558.

4. Under both the second and third counts, the question arises whether it is actionable for one person to entice another to refuse to perform a contract made with a third, where no relation of master and servant exists. If the defendant is liable in this case, then every man is liable to an action who entices his neighbor not to pay a note which he owes, not to convey real estate under a contract for its conveyance, not to carry out a contract to lend money, or not to comply with a bail bond, or a thousand other contracts into which men enter daily. There is no precedent for such an action as this; except where the domestic relations, or the relations of master and servant, are involved. In all cases, the service or contract interfered with must be either one where wages are paid and the term of service fixed, or else one where the employer retains the control and constant direction



of the work. See dissenting opinion of Coleridge, J., in *Lumley v. Gye*, 2 El. & Bl. 216, 244. So extensive a right of action as these plaintiffs contemplate would be inconsistent with the rights of a citizen under a free government.

WELLS, J. The declaration, in its first count, alleges that the defendant did, "unlawfully and without justifiable cause, molest, obstruct and hinder the plaintiffs from carrying on" their business of manufacture and sale of boots and shoes, "with the unlawful purpose of preventing the plaintiffs from carrying on their said business, and wilfully persuaded and induced a large number of persons who were in the employment of the plaintiffs," and others "who were about to enter into" their employment, "to leave and abandon the employment of the plaintiffs, without their consent and against their will;" whereby the plaintiffs lost the services of said persons, and the profits and advantages they would otherwise have made and received therefrom, and were put to large expenses to procure other suitable workmen, and suffered losses in their said business.

This sets forth sufficiently (1) intentional and wilful acts (2) calculated to cause damage to the plaintiffs in their lawful business, (3) done with the unlawful purpose to cause such damage and loss, without right or justifiable cause on the part of the defendant, (which constitutes malice,) and (4) actual damage and loss resulting.

The general principle is announced in Com. Dig. Action on the Case, A.: "In all cases where a man has a temporal loss or damage by the wrong of another, he may have an action upon the case to be repaired in damages." The intentional causing of such loss to another, without justifiable cause, and with the malicious purpose to inflict it, is of itself a wrong. This proposition seems to be fully sustained by the references in the case of *Carew v. Rutherford*, 106 Mass. 1, 10, 11.

In the case of *Keeble v. Hickeringill*, as contained in a note to *Carrington v. Taylor*, 11 East, 571, 574, both actions being for damages by reason of frightening wild fowl from the plaintiff's decoy, Chief Justice Holt alludes to actions maintained for scandalous words which are actionable only by reason of being inju-

rious to a man in his profession or trade, and adds: "How much more, when the defendant doth an actual and real damage to another when he is in the very act of receiving profit in his employment. Now there are two sorts of acts for doing damage to a man's employment, for which an action lies; the one is in respect of a man's privilege, the other is in respect of his property." After considering injuries to a man's franchise or privilege, he proceeds: "The other is where a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood; there an action lies in all cases." From the several reports of this case it is not clear whether the action was maintained on the ground that the wild ducks were frightened out of the plaintiff's decoy, as would appear from 3 Salk. 9, and Holt, 14, 17, 18; or upon the broader one, that they were driven away and prevented from resorting there, as the case is stated in 11 Mod. 74, 130. But the doctrine thus enunciated by Lord Holt covers both aspects of the case; as does his illustration of frightening boys from going to school, whereby loss was occasioned to the master. Of like import is the case of *Tarleton v. McGawley*, Peake, 205, in which Lord Kenyon held that an action would lie for frightening the natives upon the coast of Africa, and thus preventing them from coming to the plaintiff's vessel to trade, whereby he lost the profits of such trade.

There are indeed many authorities which appear to hold that to constitute an actionable wrong there must be a violation of some definite legal right of the plaintiff. But those are cases, for the most part at least, where the defendants were themselves acting in the lawful exercise of some distinct right, which furnished the defence of a justifiable cause for their acts, except so far as they were in violation of a superior right in another.

Thus every one has an equal right to employ workmen in his business or service; and if, by the exercise of this right in such manner as he may see fit, persons are induced to leave their employment elsewhere, no wrong is done to him whose employment they leave, unless a contract exists by which such other person has a legal right to the further continuance of their services. If such a contract exists, one who knowingly and intentionally pro-

cures it to be violated may be held liable for the wrong, although he did it for the purpose of promoting his own business.

One may dig upon his own land for water, or any other purpose, although he thereby cuts off the supply of water from his neighbor's well. *Greenleaf v. Francis*, 18 Pick. 117. It is intimated, in this case, that such acts might be actionable if done maliciously. But the rights of the owner of land being absolute therein, and the adjoining proprietor having no legal right to such a supply of water from lands of another, the superior right must prevail. Accordingly it is generally held that no action will lie against one for acts done upon his own land in the exercise of his rights of ownership, whatever the motive, if they merely deprive another of advantages, or cause a loss to him, without violating any legal right; that is, the motive in such cases is immaterial. *Frazier v. Brown*, 12 Ohio State, 294. *Chatfield v. Wilson*, 28 Verm. 49. *Mahan v. Brown*, 13 Wend. 261. *Delhi v. Youmans*, 50 Barb. 316. A similar decision was made in *Wheatley v. Baugh*, 25 Penn. State, 528; but the suggestion in *Greenleaf v. Francis* was approved so far as this, namely, that malicious acts without the justification of any right, that is, acts of a stranger, resulting in like loss or damage, might be actionable; and the case of *Parker v. Boston & Maine Railroad*, 3 Cush. 107, was referred to as showing that such loss of advantages previously enjoyed, although not of vested legal right, might be a ground of damages recoverable against one who caused the loss without superior right or justifiable cause.

Every one has a right to enjoy the fruits and advantages of his own enterprise, industry, skill and credit. He has no right to be protected against competition; but he has a right to be free from malicious and wanton interference, disturbance or annoyance. If disturbance or loss come as a result of competition, or the exercise of like rights by others, it is *damnum absque injuria*, unless some superior right by contract or otherwise is interfered with. But if it come from the merely wanton or malicious acts of others, without the justification of competition or the service of any interest or lawful purpose, it then stands upon a different footing, and falls within the principle of the authorities first referred to.

It is a well settled principle, that words, not actionable in themselves as defamatory, will nevertheless subject the party to an action for any special damages that may occur to another thereby. Bac. Ab. Slander, C. The same is true of words spoken in relation to property, or the title thereto, whereby the party is defeated of a sale, or suffers damage in any way. Bac. Ab. Action on the Case, I. Com. Dig. Action on the Case, C. So also, if, by a wrongful claim of title or lien, the owner is prevented from perfecting a sale, or a purchaser from obtaining delivery to himself of goods, an action will lie. *Green v. Button*, 2 Cr., M. & R. 707.

In all these cases, the damage for which the recovery is had is not the loss of the value of actual contracts by reason of their non-fulfilment, but the loss of advantages, either of property or of personal benefit, which, but for such interference, the plaintiff would have been able to attain or enjoy. Indeed, it has been held that loss by the breach of contract, or the wrongful conduct of another than the defendant, would not be recoverable as damages under a *per quod*. *Vicars v. Wilcocks*, 8 East, 1. *Morris v. Langdale*, 2 B. & P. 284. Bac. Ab. Slander, C.

This doctrine has been doubted, especially in *Lumley v. Gye*, 2 El. & Bl. 216, 239, where the case of *Newman v. Zachary*, Aleyn, 8, is cited to the contrary. That was an action on the case, maintained for wrongfully representing to the bailiff of a manor that a sheep was an estray, in consequence of which it was wrongfully seized; the reason for the decision being, "because the defendant, by his false practice, hath created a trouble, disgrace and damage to the plaintiff." But the distinction is unimportant in a case like the present, where the damage to the plaintiffs is alleged to have been the direct result of the wrongful conduct of the defendant, and so intended by him; except that it is significant of the point that the existence and defeat of rights by contract are not essential to the maintenance of an action for malicious wrong, when the defendant has no pretext of justifiable cause.

The case of *Green v. Button*, 2 Cr., M. & R. 707, is especially a point in this connection. The defendant, by means of a false

claim of a lien, and of words discrediting the plaintiff, induced one who had sold goods to the plaintiff to refuse to deliver them, whereby he was injured in his business. The court, alluding to the doubts that had been expressed as to *Vicars v. Wilcocks* and *Morris v. Langdale*, and without deciding that question, distinguished the case under consideration, on the ground that, the goods not having been paid for, there was no absolute contract to deliver, upon which the plaintiff could have his remedy against the seller; that is, as the delivery was prevented by the wrongful conduct of the defendant, and there was no binding contract broken by the seller, therefore the plaintiff was entitled to recover in his action on the case *per quod*.

In *Gunter v. Astor*, 4 J. B. Moore, 12, an action was maintained for enticing away workmen from their employment for a piano manufacturer. They were not hired for a limited time, but worked by the piece. The discussion indicates that damages were considered to be recoverable for the breaking up or disturbance of the business of the plaintiff, whereby he suffered the loss of his usual profits for a long period. The grounds of damage were apparently regarded as altogether independent of the mere loss of any contracts with the workmen.

In *Benton v. Pratt*, 2 Wend. 385, it is held that proof of loss by the plaintiff of what he would otherwise have obtained, though there was no contract for it which he could enforce, will sustain an action for the wrongful conduct by which the loss was occasioned.

The difficulty in such cases is to make certain, by proof, that there has been in fact such loss as entitles the party to reparation; but that difficulty is not encountered in the present stage of this case, where all the facts alleged are admitted by the demurrer. The demurrer also admits the absence of any justifiable cause whatever. This decision is made upon the case thus presented, and does not apply to a case of interference by way of friendly advice, honestly given; nor is it in denial of the right of free expression of opinion. We have no occasion now to consider what would constitute justifiable cause.

The second and third counts recite contracts of the plaintiffs with their workmen for the performance of certain work in the manufacture of boots and shoes; and allege that the defendant, well knowing thereof, with the unlawful purpose of hindering and preventing the plaintiffs from carrying on their business, induced said persons to refuse and neglect to perform their contracts, whereby the plaintiffs suffered great damage in their business.

It is a familiar and well established doctrine of the law upon the relation of master and servant, that one who entices away a servant, or induces him to leave his master, may be held liable in damages therefor, provided there exists a valid contract for continued service, known to the defendant. It has sometimes been supposed that this doctrine sprang from the English statute of laborers, and was confined to menial service. But we are satisfied that it is founded upon the legal right derived from the contract, and not merely upon the relation of master and servant; and that it applies to all contracts of employment, if not to contracts of every description.

In *Hart v. Aldridge*, Cowp. 54, it was applied to a case very much like the present.

In *Gunter v. Astor*, 4 J. B. Moore, 12, it was applied to the enticing away of workmen not hired for a limited or constant period, but who worked by the piece for a piano manufacturer.

In *Sheperd v. Wakeman*, Sid. 79, it was applied to the loss of a contract of marriage by reason of a false and malicious letter claiming a previous engagement.

In *Winsmore v. Greenbank*, Willes, 577, the defendant was held liable in damages for unlawfully and unjustly "procuring, enticing and persuading" the plaintiff's wife to remain away from him, whereby he lost the comfort and society of his wife, and the profit and advantage of her fortune.

In *Lumley v. Gye*, 2 El. & Bl. 216, the plaintiff had engaged Miss Wagner to sing in his opera, and the defendant knowingly induced her to break her contract and refuse to sing. It was objected that the action would not lie, because her contract was merely executory, and she had never actually entered into the service of the plaintiff; and Coleridge, J., dissented, insisting

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that the only foundation for such an action was the statute of laborers, which did not apply to service of that character; but after full discussion and deliberation it was held that the action would lie for the damages thus caused by the defendant.

In *Boston Glass Manufactory v. Binney*, 4 Pick. 425, which was for inducing workmen, skilled in several departments of glass-making, to leave the employment of the plaintiff, it was not suggested that the defendants would not have been liable if there had been an existing contract between the plaintiff and the workmen.

Upon careful consideration of the authorities, as well as of the principles involved, we are of opinion that a legal cause of action is sufficiently stated in each of the three counts of the declaration.

*Demurrer overruled.*

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BOSTON AND ALBANY RAILROAD COMPANY *vs.* WALTER  
SHANLY & others.  
THOMAS CARNEY *vs.* SAME.

One who knowingly delivered an apparently harmless package, containing a dangerous and explosive substance, to a common carrier for transportation, without giving him notice of its contents, is liable for damages caused by its explosion while the carrier was transporting it in ignorance of its contents and with care duly adapted to its apparent nature. Two substances, manufactured by different manufacturers, were dangerously explosive in combination with one another, and were ordinarily used together. A customer sent separate orders to the manufacturers for quantities of the respective substances to be forwarded to him by a certain common carrier; and directed one of them to make the substance which he was to furnish of greater explosive power than usual. The orders were fulfilled, and the substances delivered in apparently harmless packages to the carrier, by the manufacturers, each of whom acted independently of the other and was ignorant of the other's proceedings; and no notice was given to the carrier of the nature of the substances or either of them. He stowed them together in his vehicle; and while he was transporting them with due care they exploded, and injured his property and property of others in his custody, and also property of a third person near which the vehicle was standing. The explosion was practically a single one, and it was impossible to distinguish how much of the damage was produced by either substance. *Held*, that the manufacturers, but not the customer, were jointly liable to the carrier and the third person respectively, in actions of tort for their injuries.

In an action of tort for injuries occasioned to the plaintiff by the explosion in the vehicle of a common carrier of substances which the defendants had negligently delivered to him for transportation without notice of their dangerous nature, an allegation in the

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writ, that the action is brought for the benefit of the carrier, raises no presumption that negligence of the carrier contributed to the plaintiff's injuries, and may be rejected as surplusage; and a description in the declaration of the injuries as consisting in the destruction of "a certain building and other property of great value, belonging to the plaintiff" and situated near where the vehicle was standing at the time of the explosion, is a sufficiently definite allegation of damage.

THE FIRST CASE was an action of tort against Walter Shanly and Francis Shanly, of North Adams; Hugo Dittmar, Carl Dittmar and Gottlieb F. Burkhardt of Boston; the Oriental Powder Company, a corporation having a usual place of business in Boston; and William H. Jackson, Ezra F. Newhall, Julius Smith and Peter Hinds, of Boston. Writ dated August 8, 1870.

The first count in the declaration alleged that the plaintiffs were a corporation, and owned a railroad, and were common carriers, between Boston in Massachusetts and Albany in New York and intermediate towns, and were also lessees of a railroad, and common carriers, between the town of Pittsfield, which was situated on the first named railroad, and North Adams, another town in Massachusetts; "that said Dittmars and Burkhardt manufactured for said Shanlys at their request, as well as for other persons, a new, dangerous, explosive, combustible and inflammable compound, recently discovered and manufactured, called by a new name, not generally known, now [new?] in the market, and the qualities were and are not generally known, made in part of nitro-glycerine, itself an exceedingly dangerous, explosive and combustible substance; that the said Oriental Powder Company and the said Jackson, Newhall, Smith and Hinds, officers or agents of said company, also manufactured for said Shanlys at their request, as well as for other persons, certain dangerous articles or contrivances called exploders, designed to be used, and used, to set on fire and explode said new compound; and that said Shanlys, well knowing the dangerous character and qualities of said new compound and of said exploders, ordered and requested said Dittmars and Burkhardt to send a large quantity of said new compound, and also ordered and requested said Oriental Powder Company, and its said officers and agents, to send a quantity of said exploders, to them at said North Adams, and for their use, in the cars and over said railroads of the plaintiffs, but gave



no notice or information in regard to said new compound or exploders, or as to the dangerous character and qualities of either, to the plaintiffs."

It further alleged "that said Dittmars and Burkhardt packed, and caused to be packed, not in a proper or safe, but in an improper, unsafe and dangerous manner, a large quantity, to wit, ten cases, of said new compound, to be sent to said Shanlys, over the said railroads and in said cars, in accordance with said order and request, and delivered the same to the plaintiffs, well knowing that the same were dangerous as aforesaid. as 'Ten cases of dualin,' a new name not known in the market, nor generally known, which the plaintiffs aver neither they, nor the persons employed in their behalf to receive or transport goods for them as common carriers, knew, or could reasonably be expected to know, were of a dangerous nature or were not properly packed, and without giving due and sufficient notice to the plaintiffs or said persons that the same were of a dangerous nature, but on the contrary declaring and averring that they were safe and not of a dangerous nature, so that said plaintiffs and persons neither could exercise the option to refuse to accept and carry the same, nor if accepted stow and carry the same so as not to endanger or injure persons or property;" and also that the Oriental Powder Company, and its said officers and agents, packed, and caused to be packed, in an improper, unsafe and dangerous manner, two hundred pounds of said exploders in a box, to be sent to the Shanlys at North Adams, in accordance with their request, over the said railroads and in said cars, and, well knowing that the same were dangerous as above alleged, delivered them to the plaintiffs as "One box," which (in the same words as the like allegations relating to the dualin) neither the plaintiffs nor their employees knew, or could reasonably be expected to know, were of a dangerous nature or improperly packed, and without giving the plaintiffs notice of the dangerous nature of the package, but declaring on the contrary that it was safe, and so preventing the plaintiffs from using their option to refuse to carry it, and from taking precautions in stowing and carrying it, if they should accept it for transportation.

It finally alleged "that said new compound and said exploders, being in their nature dangerous, combustible and inflammable as aforesaid and being improperly packed as aforesaid, did by reason of such nature and such improper packing take fire and explode; that said exploders, so taking fire and exploding, did cause said dualin to take fire and explode, and said dualin, taking fire and exploding, caused said exploders to take fire and explode; that the taking fire and explosion of said exploders, and the taking fire and explosion of said dualin, both separately and by the combination thereof, destroyed sundry cars and other property belonging to the plaintiffs, as well as a large amount of goods in said cars, in their care and possession, for the safe delivery of which the plaintiffs were responsible to the shippers thereof, and to whom they have been obliged to make and have made good the loss;" and also "that by said explosion great damage and injury was caused to other property and persons, for which it is claimed that the plaintiffs are liable and obliged to pay, and so the plaintiffs aver that, if they are so liable and obliged to pay, the defendants are bound to indemnify and protect them against such claims, and to pay them whatever they have paid or shall pay thereon or therefor."

A second count was as follows: "And the plaintiffs further say that said Shanlys wrongfully requested said Dittmars and Burkhardt to prepare and manufacture a quantity of said new compound in an unusually dangerous manner, more explosive and powerful than that they had previously made or ought to make the same, and that the same should be sent to them, the said Shanlys, on said railroads and cars, and requested said other defendants to manufacture and forward to them on said roads and cars a quantity of said exploders; and that said Dittmars and Burkhardt did accordingly negligently and wrongfully manufacture the said dualin in said negligent and improper manner, and said other defendants did accordingly manufacture said quantity of said exploders, and both and each delivered said dualin and exploders respectively to be carried as aforesaid on said road and cars, packed as aforesaid, to said plaintiffs; and that said dualin and said exploders did each and both take fire and explode by

reason of said manufacture and packing, and did each respectively cause the other to explode, and such explosion did destroy and injure property as aforesaid to the damage of the plaintiffs."

The Shanlys demurred to the declaration, on the grounds (1) that it did not in either count thereof state a legal cause of action substantially in accordance with the rules contained in the Gen. Sts. c. 129; (2) that no joint tort of the defendants was alleged, but the allegations showed that the several defendants, in the acts attributed to them respectively, acted independently of others of the defendants; (3) that the allegations showed that the injury was occasioned by negligence in which these defendants did not participate; and (4) that the allegations of damage were too indefinite. The Dittmars and Burkhardt jointly filed a like demurrer.

The Oriental Powder Company demurred, on the grounds (1) that no joint tort of all the defendants was alleged, but on the contrary it appeared from the declaration that the torts complained of were several of the several defendants; (2) that no cause of action was alleged against these defendants; (3) that the allegations showed that the plaintiffs' own acts and negligence caused or contributed to the damage. Jackson, Newhall, Smith and Hinds severally filed like demurrers.

The case was thereupon reserved by *Gray, J.*, for the determination of the full court; if the demurrers should be overruled, the defendants to answer over; if sustained, judgment to be rendered for the defendants, unless the court should be of opinion that it is reasonable that the plaintiffs should be allowed to amend.

THE SECOND CASE was also an action of tort against the same defendants, and was expressed in the writ to be brought in the name of Thomas Carney "for the benefit of the Boston and Albany Railroad Company, assignee." The declaration, in its first count, contained allegations like those above recited from the first count of the declaration in the other case, down to the final allegation thereof, and concluded thus:

"And the plaintiff further says that in the said city of Worcester, through which, as the defendants well knew, said first men

tioned railroad [that is to say, the railroad from Boston to Albany] passes, there were situated near by said railroad a certain building and other property of great value belonging to the plaintiff; and that said new compound [that is to say, the dualin] and said exploders, being in their nature dangerous, combustible and inflammable as aforesaid, and being improperly packed as aforesaid, did by reason of such nature and improper packing take fire and explode; that said exploders so taking fire and exploding did cause said dualin to take fire and explode, and said dualin taking fire and exploding caused said exploders to take fire and explode; and that the taking fire and explosion of said exploders, and the taking fire and explosion of said dualin, both separately and by the combination thereof, damaged and destroyed said building and other property."

A second count was added in general terms like those of the second count in the first case, varied only by limiting the allegations of damage to the plaintiff's property.

The defendants demurred to the declaration, and the case was heard by *Gray, J.*, and reserved by him in the same terms as the former case for the determination of the full court. The substance of the demurrer appears in the opinion. The two cases were argued together.

*C: Allen*, for the Shanlys, besides cases referred to in the opinion, cited *Lamb v. Crafts*, 12 Met. 356; *Gardner v. Joy*, 9 Met. 177; Addison on Torts (3d ed.) 16, 398-395, 407, 451, 455, 456; *Butler v. Hunter*, 7 H. & N. 826; *Sadler v. Henlock*, 4 El. & Bl. 570, 578; *Reedie v. London & Northwestern Railway Co.* 4 Exch. 244; *Bell on Sale*, 84-89; 2 Kent Com. (6th ed.) 500; *Story on Sales* (4th ed.) §§ 305, 388, 390; *Brown on Sale*, §§ 523, 525, 526; *Benjamin on Sale*, 515; *Judson v. Western Railroad Co.* 4 Allen, 520; *Norway Plains Co. v. Boston & Maine Railroad*, 1 Gray, 263, 275; *Clarke v. Hutchins*, 14 East, 475; *Buckman v. Levi*, 3 Camp. 414; *Finn v. Clark*, 10 Allen, 479, and 12 Allen, 522; *Finn v. Western Railroad Co.* 102 Mass. 283; *Coombs v. Bristol & Exeter Railway Co.* 3 H. & N. 1, 6, *Hudson v. Baxendale*, 2 H. & N. 575; Addison on Contracts (6th ed.) 470, 480; *Wood v. Cobb*, 13 Allen, 58; *Forayth v.*

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*Hooper*, 11 Allen, 419, 421; *Brckett v. Lubke*, 4 Allen, 138  
*Linton v. Smith*, 8 Gray, 147; *Hilliard v. Richardson*, 3 Gray  
 349; *Coomes v. Houghton*, 102 Mass. 211; *Quarman v. Burnett*,  
 6 M. & W. 499, 510, 511; *Milligan v. Wedge*, 12 Ad. & El. 737,  
*Rapson v. Cubitt*, 9 M. & W. 710, 713; Story on Agency (7th  
 ed.) § 452; *Herne v. Garton*, 2 El. & El. 66; *Pierce v. Winsor*,  
 2 Sprague, 35; *S. C.* 2 Clifford, 18; *Walker v. Jackson*, 10 M.  
 & W. 161; St. 1871, c. 6, § 2; *Putnam v. Tillotson*, 13 Met.  
 517; *Merchants' National Bank v. Bangs*, 102 Mass. 291, 295.  
*Gilman v. Eastern Railroad Co.* 10 Allen, 233, and 13 Allen,  
 433; *Felch v. Allen*, 98 Mass. 572; *Seaver v. Boston & Maine*  
*Railroad*, 14 Gray, 466; Smith on Mast. & Serv. (8d ed.) 107,  
 108; Story on Agency, §§ 207, 308; *Albro v. Jaquith*, 4 Gray,  
 99; Met. Con. 11; *Parsons v. Winchell*, 5 Cush. 592; *Hewett*  
*v. Swift*, 3 Allen, 420; *Campbell v. Phelps*, 1 Pick. 62.

*G. Sennott*, (*T. L. Nelson* with him,) for the Dittmars and  
 Burkhardt.

*J. W. Perry*, (*W. C. Endicott* with him,) for the Oriental  
 Powder Company, and for Jackson, Newhall, Hinds and Smith,  
 besides cases referred to by other counsel and in the opinion, cited  
 Gen. Sts. c. 88, § 50; *Adams v. Hall*, 2 Verm. 9; *Williams v.*  
*Sheldon*, 10 Wend. 654; *Guille v. Swan*, 19 Johns. 381; *Cory-*  
*ton v. Lithebye*, 2 Saund. 117; *Carter v. Towne*, 103 Mass. 507;  
*Tutein v. Hurley*, 98 Mass. 211; *Davidson v. Nichols*, 11 Allen,  
 514; *Thomas v. Winchester*, 2 Selden, 397; *Flower v. Adam*,  
 2 Taunt. 314; *Thorogood v. Bryan*, 8 C. B. 115; *Lockhart v.*  
*Lichtenthaler*, 46 Penn. State, 151; *Cleveland, Columbus & Cin-*  
*cinnati Railroad Co. v. Torry*, 8 Ohio State, 570; *Puterbaugh*  
*v. Reasor*, 9 Ohio State, 484; *Brown v. New York Central Rail-*  
*road Co.* 31 Barb. 385; *Smith v. Smith*, 2 Pick. 621.

*G. S. Hale*, for the plaintiffs, besides cases referred to by other  
 counsel and in the opinion, cited St. 29 & 30 Vict. c. 69, § 6.  
*Longmeid v. Holliday*, 6 Exch. 761, 767; *Hutchinson v. Guion*,  
 5 C. B. (N. S.) 149; *Penton v. Murduck*, 22 Law Times (N. S.)  
 871; *Illidge v. Goodwin*, 5 C. & P. 190; *Lynch v. Nurdin*, 1 Q  
 B. 29; *Colegrove v. New York & New Haven Railroad Co.* 20  
 N. Y. 492; *Hawkesworth v. Thompson*, 98 Mass. 77; *Eaton v*

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*Boston & Lowell Railroad Co.* 11 Allen, 500, 505; *Robinson v. Vaughton*, 8 C. & P. 252; *Scott v. Hunter*, 46 Penn. State, 192; Dicey on Parties, 87, 440; *Griffith v. Ingledew*, 6 S. & R. 429, 437; Powell on Carriers (2d ed.) 207, 208; Angell on Carriers, §§ 495, 497, 499; *Blanchard v. Page*, 8 Gray, 281; *Abbott v. Macfie*, 2 H. & C. 744; Sedgwick on Damages (5th ed.) 109; *Dixon v. Bell*, 1 Stark. 287; *Richardson v. Chasen*, 10 Q. B. 756.

CHAPMAN, C. J. The first case comes before us upon a demurrer to the plaintiffs' declaration. The action is against Walter and Francis Shanly, of North Adams; Hugo and Carl Dittmar and Gottlieb F. Burkhardt, of Boston; the Oriental Powder Company, a corporation established in Boston; and Jackson, Newhall, Smith and Hinds, of Boston, the officers or agents of the company. The first count alleges that the plaintiffs are common carriers between Boston and North Adams, upon their own railroad from Boston to Pittsfield, and thence to North Adams upon the Pittsfield and North Adams Railroad, of which they are lessees; that said Dittmars and Burkhardt manufactured for said Shanlys, at their request, as well as for other persons, a new, dangerous, explosive, combustible and inflammable substance, called by a new name, not generally known, (but afterwards called dualin in the declaration,) now in the market, and the qualities not generally known, and made in part of nitro-glycerine, which is itself an explosive and dangerous substance; that the Oriental Powder Company, and its said officers and agents, also manufactured for the Shanlys, at their request, as well as for other persons, certain dangerous articles, called exploders, designed to be used for exploding said new compound; that the Shanlys, knowing the dangerous character of said compound and of said exploders, ordered and requested said Dittmars and Burkhardt to send to them at North Adams, in the plaintiffs' cars, a quantity of said compound, and ordered and requested the said Oriental Powder Company to send them in the same way a quantity of said exploders, but gave no notice to the plaintiffs of the dangerous character of either of said articles; that the Dittmars and Burkhardt sent ten cases of the compound, and delivered them to the plaintiffs as ten cases of dualin, knowing them to be

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of a dangerous character, but did not give notice to the plaintiffs, nor did the plaintiffs know, of their dangerous character, but the Dittmars and Burkhardt declared that they were safe and not of a dangerous character; that the Oriental Powder Company, and their said officers and agents, sent two hundred pounds of exploders accordingly, but packed them in an improper and dangerous manner, and gave the plaintiffs no notice of their dangerous character, but delivered them as "one box," and the plaintiffs did not know of their dangerous character; that the dualin and exploders did by reason of their nature and improper packing take fire and explode, and the exploders taking fire and exploding caused the dualin to explode, and this taking fire and exploding, both separately and by the combination thereof, destroyed sundry cars and other property of the plaintiffs, and other goods which they had as carriers and for which they were liable to pay.

Both the dualin and the exploders are thus alleged to be explosive and dangerous articles. Each of them was sent without giving notice of its character to the plaintiffs, and they were ignorant in respect to it. The rule of law on this subject is in conformity with the dictates of common sense and justice, and is well established. One who has in his possession a dangerous article, which he desires to send to another, may send it by a common carrier if he will take it; but it is his duty to give him notice of its character, so that he may either refuse to take it, or be enabled, if he takes it, to make suitable provision against the danger. The reason for requiring this notice is still stronger, if other persons would be exposed to danger from it; but the duty is the same. This principle is established in application to the sending of goods by carriers, in *Williams v. East India Co.* 3 East, 192. See also *Brass v. Maitland*, 6 El. & Bl. 470, and *Farrant v. Barnes*, 11 C. B. (N. S.) 553. The duty does not arise from any contract, express or implied, but from the principle expressed in the maxim *Sic utere tuo ut alienum non lædas*. The principle is held by this court in its broadest signification. In *Carter v. Towne*, 98 Mass, 567, it was held that a trader who sold gunpowder to a boy, eight years of age, who had no knowledge or experience in the use of it and was unfit to be intrusted with it and

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injured himself afterwards by its explosion, was liable to an action for the damage. In *Wellington v. Downer Kerosene Oil Co.* 104 Mass. 64, an action was maintained against a retailer of fluids for knowingly selling naphtha, a dangerous article, to be burned in a lamp, the plaintiff being ignorant of its qualities. There are numerous cases which sustain this principle in various forms, but these are sufficient for its illustration.

This principle is not changed by the alleged fact that the Shanlys requested the Dittmars and Burkhardt to manufacture a quantity of the dualin in an unusually dangerous manner, and that they did so manufacture it. If it was a dangerous article, the duty of the sender was to give the notice; and if it was so in an unusual degree, that fact only made the duty more important.

But assuming that these parties were guilty of a violation of duty as alleged, it is yet contended that the manufacturers of the dualin and the manufacturers of the exploders cannot be joined in one action for the injury. It is not alleged that these parties acted in concert in making the several articles, or placing their respective articles in the plaintiffs' care, nor even that they had knowledge of each other's proceedings. Each acted separately in sending goods, and omitting to give notice. But each party violated his duty none the less because he was ignorant as to what other articles were to be carried in the same car with his. By neglecting to give the notice, he took the risk of any danger that might reasonably be apprehended from the proximity of other goods that the carriers might take in ignorance of the danger. If, as the declaration imports, dualin and exploders are ordinarily used together, any person sending either of the two substances might reasonably apprehend the possibility that a quantity of the other substance might be carried with it. Nor is it material which of the articles caused the other to be ignited. Practically a single injury was produced, and it is impossible to distinguish how much of it was actually produced by the exploders and how much by the dualin.

The defendants cite a remark of Chief Justice Shaw in *Marble v. Worcester*, 4 Gray, 395, 397, which, if they interpret it correctly, would leave a wrongdoer to injure others with impunity if other



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wrongdoers were guilty of independent acts that contributed to produce the same injury. But the chief justice himself applied the remark to the case before him, which was an action upon a statute, against a town; and the case is to be limited in its application to actions against towns. *McDonald v. Snelling*, 14 Allen, 290.

They also contend that the case is like those where it is held that a joint action will not lie against the several owners of dogs which have together worried a flock of sheep, each owner being separately liable for the damage done by his own dog. *Buddington v. Shearer*, 20 Pick. 477. *Van Steenburgh v. Tobias*, 17 Wend. 562. *Auchmuty v. Ham*, 1 Denio, 495. *Russell v. Tomlinson*, 2 Conn. 206. But in such cases there is no concurrence of intent or action among the several owners of the animals in producing the same injury. A person's responsibility for the act of his dog arises from the fact of ownership, and rests on a different ground from that of his responsibility for the physical action of a chemical or mechanical substance prepared and sent by him, or of a nuisance which he has placed so that it will occasion injury to others. His act is the direct cause of the injury done by such means. In this case, the acts of the parties who wrongfully sent the dangerous substances were contributory to the catastrophe, as much as if they had separately contributed to the raising of a pile of offal which occasioned an offensive odor, or had at one time separately fired a building by distinct torches, each of which contributed to a conflagration of the whole. It cannot be, that, because the several wrongdoers have so contributed to the injury that it is impossible to distinguish what portion of it was caused by each, therefore they can escape with impunity. On the contrary, each is liable for the whole. The case is similar to *Stone v. Dickinson*, 5 Allen, 29, and 7 Allen, 26, where several creditors of Stone brought actions against him, and each caused him to be imprisoned for the same space of time. The injury being one, it was held that, though there had been no concert between them, he could maintain one action against all, and each was liable for the whole damage. The same doctrine was held in *Ellis v. Howard*, 17 Verm. 330.

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The many ways in which wrongdoers may injure another give rise to some nice distinctions ; but when their several acts directly contribute to produce a single injury, each being sufficient to have caused the whole, and it is impossible to distinguish the portions of injury caused by each, that concurrence ought to render each of them liable for the whole in a joint action. On this ground, the manufacturers who sent the articles are jointly liable in this action.

The liability of the Shanlys depends upon their concurrence in the tortious acts of the other defendants. The declaration cannot be fairly construed as alleging that the manufacturers were their servants or agents. It is alleged that they were manufacturers of the dangerous articles for the Shanlys and others. The allegation, that the Shanlys ordered and requested each of them to send a specified quantity of these articles to them by the plaintiffs' railroad, imports an order from a purchaser, such as is usually given by purchasers to manufacturers. If the articles were required in the order to be of unusual strength, this is not unlike an order for spirits of unusual strength, or cloths of unusual weight or fineness or peculiar color, and does not change the nature of the transaction. Nor does it imply a request that the goods should be carelessly or improperly packed, or that there should be any neglect to give such notices to the carriers as would be proper. If nothing was said on these subjects, it would be implied that the packing and whatever else was proper, including notices and directions, should be properly attended to.

It being the duty of the senders to give proper notice of the character of the goods to the carrier, the question arises whether it was also the duty of the consignee to give such notice. There is no authority for holding him to be thus liable, and it would be useless and unreasonable to require it of him. It should be given at or about the time of offering the goods to the carrier. The consignee is not likely to know the time, especially if he lives at a distance ; nor is he likely to know what articles may be sent together ; nor is there any occasion to send an additional notice, it being the duty of the consignor to give notice. In this case, it is not alleged that the Shanlys requested the consignors to

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neglect any duty or conceal any facts, and there is no ground to hold them responsible for the negligence or improper conduct of the other defendants.

*Demurrer sustained as to the Shanlys, and overruled as to the others.*

The writ in the second case contains two counts. The first alleges the same wrongful acts which are set forth in the action of the Boston and Albany Railroad Company against these defendants. Its additional allegations are, that the railroad passes through the city of Worcester; that the plaintiff had, as the defendants well knew, a building and other property of great value situated near by the railroad in that city; and that the said dangerous articles took fire and exploded, and damaged and destroyed the said building and other property. The second count is general, but it is not necessary to refer to it more particularly.

The case comes before us on the several demurrers of the defendants to the declaration.

The first cause of demurrer assigned by the Oriental Powder Company is removed by an amendment of the second count, which charges all the defendants. The second ground assigned by them is, that these defendants are joined in an action of tort with other defendants, and no joint tort of all the defendants is alleged. This ground is disposed of by the principle stated in the case of the Boston and Albany Railroad Company against the same defendants.

The third cause assigned is, that no cause of action is alleged against these defendants. The alleged cause of action is, that these defendants caused dangerous and explosive articles to be carried by the railroad near to the plaintiff's building, where they exploded, and thereby injured the plaintiff's property. Such an injury is tortious and actionable, whether it is done wilfully or negligently.

The fourth cause alleges that it appears from the plaintiff's writ and declaration that the plaintiff has received full compensation for all the damages suffered by him, and that the Boston and Albany Railroad Company have paid him and sue in his name to recover back the amount so paid by them; and the defendants

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show that if the Boston and Albany Railroad Company have paid said damages to the plaintiff, it was because their negligence had rendered them liable to pay him, and if they were negligent and liable to pay him he cannot maintain this action. This statement includes an alleged cause of demurrer and an argument. It is sufficient to say, in respect to it, that the writ merely alleges that the action is brought for the benefit of the Boston and Albany Railroad Company as assignees. This does not imply any fault or liability on the part of the assignees. The assignment may have been made for a variety of reasons. The allegation in the writ is mere surplusage. It can only operate as a notice of such equitable rights as the assignment may confer. Nor is the allegation in the writ mentioned as a cause of demurrer.

The fifth cause alleges that it appears from the writ and declaration, that the acts and negligence of the Boston and Albany Railroad Company, in whose behalf this action is prosecuted, caused or contributed to the damage complained of. We find no such allegation; but on the contrary it is alleged that they had no notice or knowledge of the dangerous character or of the improper packing of the articles.

In addition to these causes, the defendants Burkhardt and Dittmar allege that the allegation of damage is too indefinite. But each of the counts alleges what damage was caused by the wrongful acts; and though the statement is very general, it is sufficient to sustain an action.

The Shanlys demur on several grounds, one of which is that no cause of action is alleged against them. For reasons stated in the case of the Boston and Albany Railroad Company against them, this cause must be sustained.

*Demurrer of the Shanlys sustained: demurrers of the other defendants overruled.*

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Wellington v. Norwich & Worcester Railroad Company.

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**TIMOTHY W. WELLINGTON & another vs. NORWICH AND  
WORCESTER RAILROAD COMPANY & others.**

The terminal freight stations of two railroads in an inland city were connected by a track a mile long, part of which belonged to the first road and the rest to the second. The first road gave notice that its rate for transportation of coal from a seaport to the city would be \$1.75, and from the seaport to stations on the second road \$1.25, per ton. *Held*, that the lesser rate did not apply to coal which was ordered to be transported from the seaport to the city and delivered there at the terminal freight station of the second road, without being transferred for further transportation or delivery so as to give rise to successive charges or an apportionment of the gross freight charges between the two roads.

BILL IN EQUITY filed May 26, 1871, to compel the Norwich & Worcester Railroad Company, a corporation under the law of Massachusetts, to transport and deliver coal to the plaintiffs.

The bill alleged that the plaintiffs were coal dealers in Worcester, and the defendants owned a railroad and were common carriers between that city and tide water at Norwich in Connecticut; that on March 28, 1871, the defendants agreed in writing with the plaintiffs "that they would receive and carry coal for the plaintiffs for one year from April 1, 1871, from tide water to Worcester, to be delivered by them to the plaintiffs on the line of said railroad at the rate of \$1.75 per ton, and to be delivered at stations on the line of the Worcester & Nashua Railroad, connecting with the defendants' railroad at Worcester, at the rate of \$1.25 per ton for its transportation over the defendants' said road to Worcester, and also agreed to pay for all switching of the coal so carried;" that, relying on this agreement, the plaintiffs entered into many contracts to sell and deliver coal to their customers, and bought coal in New York and contracted for its transportation to the terminus of the defendants' railroad at tide water in Norwich, and gave notice thereof to the defendants, and directed them to receive the coal upon its arrival at Norwich, and deliver it to the plaintiffs at Lincoln Square, a station on the line of the Worcester & Nashua Railroad; that a portion of the coal had arrived at Norwich and been received by the defendants and carried to Worcester, and was in the possession of the defendants there; that another portion of it was in course of transportation

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by water from New York to the terminus of the railroad at Norwich ; and that the Worcester & Nashua Railroad Company were willing and ready to receive and transport said coal over their railroad to their said station at Lincoln Square ; but that the defendants wrongfully pretended that they were not bound to transport said coal over their railroad to stations of the Worcester & Nashua Railroad in Worcester at the rate of \$1.25 per ton, and insisted that they were entitled to charge and receive therefor \$1.75 per ton ; that the plaintiffs had offered and were ready and willing to pay them for such transportation at the lesser rate, and to give them a sufficient bond to pay the difference between that and the higher rate if the construction put upon the contract by them should be determined to be the true one, and had requested them to transport and deliver the coal accordingly, but the defendants had refused to do so ; that the defendants refused to deliver the coal which was in their possession at Worcester, and to receive and transport that which was to arrive at Norwich, unless the plaintiffs would first pay them the full rate of \$1.75 per ton ; that the plaintiffs, by reason of such refusal, would suffer injuries in their business, through inability to fulfil their contracts with their customers, for which they would have no adequate and complete remedy at law ; and that of all this the defendants had notice, and by persisting in their said refusal were endeavoring to coerce the plaintiffs to pay said higher rate.

The prayer was, for an injunction on the defendants "to receive and transport said coal from tide water to said Lincoln Square station and there deliver all said coal to the plaintiffs, they hereby offering to pay therefor at the rate of \$1.25 per ton and to give such bond as the court may order for the payment of fifty cents additional per ton in case it shall be finally determined that they are bound so to do ;" and for general relief.

The bill was afterwards amended by alleging that the Norwich & Worcester Railroad had been leased to the Boston, Hartford & Erie Railroad Company, and that receivers of the property, franchises and effects of said company had been appointed by this court in Suffolk, and were operating the leased railroad under the appointment ; and by joining the receivers as defendants.

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At a hearing, before *Gray, J.*, upon a motion for a preliminary injunction, the following facts appeared :

On March 28, 1871, the defendants, by their superintendent, addressed a letter to the plaintiffs concerning the transportation of coal over the Norwich & Worcester Railroad. The material part thereof was as follows :

"The following will be the rates per gross ton on coal Norwich to Worcester from April 1.

To Worcester . . . . .	\$1.75
" " for stations on B. & A. R. R. . . . .	1.25
" " " " " W. & N. R. R. . . . .	1.25

Except Nashua, Groton Junction, Clinton, Leominster and Fitchburg, which will be . . . . . 1.00

The company will also pay switching."

The plaintiffs bought 494 tons of coal in New York on March 10, 1871, and 572 tons during April. All this coal was to be shipped in sailing vessels from New York to Norwich, upon their order, and was so shipped, to the care of the defendants, in various quantities, on different schooners, at various times during the month of May, before the filing of this bill; and the plaintiffs directed the defendants "to transport all of it over their railroad from Norwich to Worcester, and to deliver it to the plaintiffs at Lincoln Square, the terminal freight station of the Worcester & Nashua Railroad in Worcester." Out of these 1066 tons of coal the plaintiffs had sold 390 tons to customers in Worcester, and 50 tons to a customer in Fitchburg, and intended to hold the rest for their general trade at their coal yards in Worcester.

It further appeared "that the Norwich & Worcester Railroad connected with the Worcester & Nashua Railroad at the Foster Street station in Worcester; that the defendants' freight depot was located quarter of a mile south of the Foster Street station, and the only freight station and one of the two passenger stations in Worcester of the Worcester & Nashua Railroad were at Lincoln Square, three quarters of a mile north of the Foster Street station; that the plaintiffs owned a coal yard in Worcester, on a branch track of the Worcester & Nashua Railroad leading from their main line at a point between Foster Street station and Lin-

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coln Square to the track of the Boston & Albany Railroad, another coal yard on the line of the Boston & Albany Railroad between Foster Street station and Washington Square, and another coal yard on the line of the Norwich & Worcester Railroad, about half a mile south of their said freight station ; and that the Norwich & Worcester Railroad Company had, under their former contracts with the plaintiffs, been accustomed to switch the cars containing the plaintiffs' coal, transported over their railroad, to the plaintiffs' coal yards in Worcester, when to be disposed of there, and to the premises of parties on the line of the defendants' road, to whom the plaintiffs had sold the coal on the cars, without additional charge therefor."

At the time of the filing of this bill, the defendants had received at Norwich 817 of the 1066 tons of coal, and transported it to Worcester ; and it was lying there in their cars on their freight ground. The other 249 tons were on board of two schooners, which had arrived from New York at the defendants' wharves in Norwich ; the defendants had refused to receive it and transport it to Worcester and deliver it to the plaintiffs at Lincoln Square at a less rate than \$1.75 per ton, if it was to be used in Worcester ; and the plaintiffs had offered to pay them at the rate of \$1.25, and to give them a bond to pay 50 cents more per ton if the court should determine that it was due.

Besides the 1066 tons of coal above referred to, the defendants, during the month of May 1871, before the filing of this bill, received at Norwich three cargoes of coal from New York, belonging to the plaintiffs, and amounting to 679 tons ; transported it to Worcester ; and delivered it to the plaintiffs at Lincoln Square by the plaintiffs' direction. The plaintiffs had offered to pay freight on it at the rate of \$1.25 per ton ; and the defendants had declined to receive the payment, and demanded \$1.75 per ton. Concerning one of these three cargoes the plaintiffs addressed a letter to the defendants' superintendent on May 1, of which the following is all but the formal part : " We were somewhat surprised to receive a letter from Mr. Parker on Saturday, in which he says that his instructions are to bill cargo coal per schooner Bentley to Worcester, and that Mr. Turner will set it over for us



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to where we want it. Now all we wish is that the cargo of coal per schooner Bentley be forwarded to Lincoln Square station, care of the Worcester & Nashua Railroad, at which place we shall receive the coal. Hoping this will be a sufficient explanation, we remain," &c. To this letter the superintendent replied on the same day, acknowledging its receipt and continuing as follows: "In reply I will say that, after we deliver the cargo of the schooner Bentley in Worcester, it can be taken to any place in Worcester, designated by you, which is reached by rail, either by our people if they get permission from the other roads, or by the agents of the Boston & Albany or Worcester & Nashua Roads. This idea of billing to Lincoln Square is simply a subterfuge, which I perfectly understand, and I here amend my letter of March 28 to read 'To Worcester for stations on the Boston & Albany and Worcester & Nashua Roads beyond Worcester.'"

The plaintiffs stated at the hearing, "that they were bound by the terms of the paper of March 28 to pay for the carriage of the coal from the defendants' freight depot in Worcester to the Lincoln Square station of the Worcester & Nashua Railroad." And the judge, by consent of the parties, reserved for the determination of the full court the question "whether the freight upon the coal ordered to be delivered at the Lincoln Square station should be \$1.75 per ton or \$1.25 per ton."

*T. L. Nelson*, for the plaintiffs.

*F. J. Lippitt*, for the receivers.

WELLS, J. The lower rates for transportation of coal from Norwich to Worcester, "for stations on W. & N. R. R.," were applicable to that which should require to be passed over to the Worcester & Nashua Railroad, for further transportation or delivery, so as to give rise to successive charges, or an apportionment of the gross freight charges between the two carriers. They did not apply to coal delivered by the defendants to the plaintiffs at Worcester; although, for the purposes of such delivery, the defendants were obliged to use the tracks of the Worcester & Nashua Railroad; and although such delivery was to be made "at Lincoln Square, the terminal freight station of the Worcester & Nashua Railroad in Worcester."

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The tracks between and at the terminal stations of the two roads must necessarily be used by each corporation for the delivery of freight for stations upon the other road ; and might properly be so used, by mutual arrangement or consent, for delivery of freight by either directly to consignees thereof in Worcester. If the defendants were ready to deliver the coal to the plaintiffs at Worcester in this mode, at the place designated by them for receiving it; the defendants had the right to do so, under the scale of rates issued, as "freight to Worcester." There is nothing in the contract, in the nature of the transaction, or in the relations of the corporations to each other, to the public or to these plaintiffs, which entitles them to require the coal to be delivered to the Worcester & Nashua Railroad, and thus secure to themselves the advantage of a concession that was intended only for freight which would be subject to successive charges. The plaintiffs' letter of May 1, insisting that their coal should be forwarded to the care of the Worcester & Nashua Railroad, was an attempt to obtain a reduction of freight charges through a literal construction of the defendants' statement of rates, inconsistent with its manifest scope and purpose. *Bill dismissed, with costs.*

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LEONARD J. WILSON *vs.* THOMAS MCLAUGHLIN.

A servant who has driven a stray horse from the highway into his master's pasture, for the purpose of preventing it from straying on cultivated land, does not become liable for its conversion by turning it into the highway again by direction of his master.

An action for the value of a stray beast as a forfeiture under the Gen. Sta. c. 70, § 10, must be brought within a year after the owner's right of action accrued by the finder's neglect.

TORT. Writ dated May 27, 1870. The declaration contained two counts. The first was for the conversion of a horse belonging to the plaintiff to the defendant's use. The second alleged that the defendant found and took up, in West Roxbury, a stray horse belonging to the plaintiff, and neglected to cause it to be entered and cried and notice thereof to be posted up as directed

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by the Gen. Sts. c. 79, §§ 1, 2,\* “wherefore the plaintiff hath a right to recover of the defendant the value of said horse, to wit, three hundred dollars, as a forfeiture, the said horse not having been delivered or otherwise accounted for by the defendant” to the plaintiff. The answer was a general denial to the first count, and set up the statute of limitations against the second count. At the trial in the superior court, before *Brigham*, C. J., without a jury, the facts were found as follows :

On October 26, 1867, a horse of the value of \$250, belonging to the plaintiff, escaped from a pasture in Milford, and appeared a day or two afterwards in a highway in West Roxbury near an avenue which led from the travelled road into the messuage of Matthew Bolles. The defendant, who was in the employment of Bolles, supposing that the horse belonged to a neighbor, one of whose beasts had previously strayed upon the land of Bolles and done damage there, drove it from the highway into an inclosed pasture belonging to Bolles, for the purpose of preventing it from straying on Bolles’s cultivated land. This was done without the direction, knowledge or authority of Bolles, who was not aware of what had been done until the horse had been in his pasture for two nights and a day, when he immediately directed

\* The Gen. Sts. c. 79, provide, in § 1, that whoever finds lost money or goods, worth three dollars or more, the owner of which is unknown, shall, among other things, cause notice thereof to be posted up in two public places in the city or town where the goods were found, and if they are worth ten dollars or more shall also, among other things, cause them to be publicly cried, if there is a crier in the place, and notice to be posted up in like manner in two adjoining places.

Section 2 provides that whoever takes up a stray beast shall cause a notice thereof to be entered in the city or town clerk’s book, containing a description of its color and marks, and cause it to be cried and notices containing a like description of it to be posted up in the manner provided in § 1, and otherwise shall not be entitled to compensation for any expenses which he may incur in relation thereto.

Section 10 provides that “the finder of lost goods, money or stray beasts, who neglects to cause the same to be entered and cried and notice thereof to be posted up as before directed, shall forfeit the value of such goods, money or beasts, unless he delivers the same or otherwise accounts therefor to the owner thereof, in which case he shall forfeit a sum not exceeding twenty dollars.”

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the defendant to turn it into the highway again, and the defendant did so, and the plaintiff never recovered it. The defendant never caused any notice of the horse to be entered with the town clerk and posted up, or the horse to be cried. Both counts related to the same horse, and to the acts and omissions of the defendant relating to it on the same occasion.

The judge ruled that these facts would not sustain the action, and ordered judgment for the defendant. The plaintiff alleged exceptions.

*H. B. Staples*, (*F. P. Goulding* with him,) for the plaintiff.

1. By taking up the horse in the highway, the defendant assumed the rights and duties of a voluntary bailee, and was bound to keep it with reasonable care for its owner. His act of discarding it was a violation of his trust, and may be treated as a conversion. Story on Bailments, §§ 85, 621. *McAvoy v. Medina*, 11 Allen, 548. *Nelson v. Merriam*, 4 Pick. 249. His failure to comply with the statute, after having taken up the horse, also makes the taking tortious, so that trover can be maintained against him. 4 Pick. 249. *Drake v. Shorter*, 4 Esp. 165. *Stevens v. Curtis*, 18 Pick. 227.

2. The action can be maintained on the second count, under the Gen. Sts. c. 79, § 10. The forfeiture is not imposed as a punishment for an offence, but for the violation or neglect of a duty prescribed by statute. This avoids the plea of the statute of limitations.

*J. S. Abbott*, for the defendant.

AMES, J. 1. It appears that, when the horse was taken up, he was going at large in the highway, and was supposed to be about to enter upon the premises of the defendant's employer. Under such circumstances, the act of turning him into an inclosed pasture was not an interference with the owner's possession, or a conversion of the horse to the defendant's own use. Nothing is shown at all inconsistent with a purpose on the defendant's part to keep the horse for the owner; and it has been decided that the finder of an estray may keep it for the owner, and is not liable in trover unless he uses the estray, or refuses to deliver it on demand. *Nelson v. Merriam*, 4 Pick. 249. We do not

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understand the plaintiff to complain of this act, except on the ground that the defendant afterwards violated his trust as a voluntary bailee by turning the horse into the highway again. But this, it appears to us, was the act of his employer, and not of himself. He could not keep the horse on another man's land, against the will of such other man. The turning out into the highway was therefore an act which he could not prevent, and for which he cannot be held responsible; and the plaintiff has no cause of action under his first count.

2. The second count also is attended with difficulties, at least equally great. If the defendant incurred a forfeiture by reason of not proceeding according to Gen. Sts. c. 79, § 2, his offence was committed more than one year before the date of the suit. By Gen. Sts. c. 155, § 20, all actions for a penalty or forfeiture on a penal statute, brought by any person to whom the penalty or forfeiture is given in whole or in part, shall be commenced within one year next after the offence is committed, and not afterwards. This provision is an effectual bar to the plaintiff's claim in his second count.

*Exceptions overruled.*



### CAROLINE M. LINCOLN vs. GEORGE T. LINCOLN.

A residuary gift in a will, to J. S. without words of inheritance, conveys the fee, and not a mere life estate, in land to which it applies.

CONTRACT upon a written agreement of the defendant, dated October 20, 1870, to pay \$7166 to the plaintiff in consideration that she should convey to him "an absolute inheritable title" to a parcel of land in Leominster "by a good warranty deed with usual covenants."

The plaintiff was the widow of Luke Lincoln of Leominster, who died seised and possessed of the land and left a will which was duly proved and allowed before the date of said agreement and of which the plaintiff was executrix. After a specific legacy to the testator's daughter, who was his only heir, the will contained the following clause: "The rest and residue of all my

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Dennis v. Wilson.

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property, personal, real or mixed, (after paying all just and lawful demands against my estate,) I give and bequeath to my beloved wife, Caroline M. Lincoln."

The foregoing facts were agreed, and the only question thereon was whether the plaintiff took "an absolute inheritable title" in the land, subject to the payment of the debts and legacy. If she did, judgment was to be rendered for her for a stated sum; otherwise, for the defendant.

*G. F. Hoar*, for the plaintiff.

*P. E. Aldrich*, for the defendant.

BY THE COURT. It is too well settled to need the citation of any authorities, that these words give to the devisee an estate in fee.

*Judgment for the plaintiff.*



### HULDAH A. DENNIS vs. LEONARD WILSON.

The owner of a lot of land adjoining a highway sold and conveyed part of it, excepting and reserving, without any words of inheritance, a right of way extending from the highway along the line of division between the part sold and the rest of the land, for a distance less than the whole depth of the lot. *Held*, that the right was appurtenant to the rest of the land, whether or not it was limited to the grantor's life.

TORT for the obstruction of a right of way claimed by the plaintiff, as owner of a parcel of land in Barre, over adjoining land of the defendant. Trial and verdict for the plaintiff, in the superior court, before *Dewey, J.*, who allowed a bill of exceptions the substance of which appears in the opinion.

*P. E. Aldrich*, for the defendant.

*G. F. Verry & F. A. Gaskill*, for the plaintiff.

WELLS, J. The plaintiff and defendant are adjoining owners of land fronting on the "old Worcester road." Both derive title from James W. Jenkins. Being owner of the whole tract, Jenkins conveyed the south part, which is now the defendant's, "excepting and reserving a right of way to pass and repass over said land, with teams and otherwise, on the northerly side of said premises, not exceeding eight rods from said old Worcester road."

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At the trial, in the court below, the judge ruled that this right of way was appurtenant to the remaining land of Jenkins, and, as such, passed with the land to the plaintiff. The correctness of this ruling is the only question before us, upon these exceptions.

Such an easement is never presumed to be personal, when it can fairly be construed to be appurtenant to some other estate. Washburn on Easements, 28, 29, 161. *Smith v. Porter*, 10 Gray, 66. *Case of a private road*, 1 Ashmead, 417. When there is, in the deed, no declaration of the intention of the parties in regard to the nature of the way, it will be determined by its relation to other estates of the grantor, or its want of such relations. The *terminus ad quem* is of especial significance. *White v. Crawford*, 10 Mass. 183, 187. *Kent v. Waite*, 10 Pick. 138. *Mendell v. Delano*, 7 Met. 176. *Brown v. Thissell*, 6 Cush. 254. *Stearns v. Mullen*, 4 Gray, 151, 155. *Garrison v. Rudd*, 19 Ill. 558. Washburn on Easements, 161, pl. 5. In partition of land, a right of way set to one over the land of the other would certainly be presumed to be appurtenant, unless the contrary should clearly appear. *Davenport v. Lamson*, 21 Pick. 72. A partition by deed, with provision for a way over one of the lots for the use of the owner of the other, would be taken as making the way appurtenant, as a matter of course. *Bowen v. Conner*, 6 Cush. 132. It is difficult to see how a division of an entire tract by deed of part from a sole owner, with a like provision for a way, can receive any different construction.

In this case, Jenkins conveyed to Rice part of his entire tract of land. The right of way, excepted and reserved, extended from the highway in front, along the line of division, for a specified distance, less than the whole depth of the lots. As the grantor could have no occasion, apparently, to use such a way for any other purpose than for access to and egress from his remaining land, the inference would seem to be inevitable that it was for that use that both parties must have understood and intended the way to be held.

It is contended that the want of words of limitation to heirs and assigns not only limits the right to the life of the party to whom the reservation was made, but makes it personal to him.

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If the nature of the right, as appurtenant or in gross, depended upon its duration or inheritable quality, it might be necessary to consider whether the clause in this deed is one of exception, carving the way out of the premises described in the deed, and retaining it in the grantor as a part of his former estate; or whether it created a new right in the land of the grantee by way of reservation or implied grant. But we do not think it is so dependent. Even if it were conceded that the clause in question is to be construed as one of reservation strictly, and that, for want of words of inheritance, the right is limited to the life of Jenkins, it does not follow that it is a mere personal right, not assignable. Its character must be determined by the purposes for which the way was intended to be used. Those purposes being ascertained from the terms of the deed, aided, if necessary, by the situation of the property and the surrounding circumstances, (*Green v. Putnam*, 8 Cush. 21,) the deed is to be construed accordingly. If the apparent purpose was for ingress and egress to and from the grantor's other land, that stamps the character of the way; and Jenkins cannot use it for other purposes, not connected with the occupation of such other land. A way is a means of passage from some place to some other place. A roadway or path, which leads to no place or object to which a person has an interest or right to go, is not a way. The rights of Jenkins in the way in question here, after he sold his other land and had no right to enter upon it, were reduced to mere nonentity, if they were only personal rights when reserved. Unless appurtenant to the land, his way was a useless *cul de sac*.

As a matter of authority, the case of *Bowen v. Conner*, 6 Cush. 132, is directly in point. There were no words of inheritance; but the way was held to be appurtenant. The term "forever," used in that case, is not equivalent to "heirs and assigns;" and will not impart inheritable qualities. 2 Preston on Estates, 4. 2 Bl. Com. 107. *Buffum v. Hutchinson*, 1 Allen, 58. *Curtis v. Gardner*, 13 Met. 457. *Sedgwick v. Laflin*, 10 Allen, 430. If this is a reservation and not an exception, that was the same; and so the cases are parallel.



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The right of way in *Stearns v. Mullen*, 4 Gray, 151, was to the grantee and assigns only; but held to be appurtenant. The judgment is in point, though the chief justice, in his opinion, speaks of the right as limited to heirs.

A right of way may be appurtenant to the life interest of a dower estate, and expire with it. *Hoffman v. Savage*, 15 Mass. 130.

Whether a way is appurtenant to land depends upon its relation to the land in respect of use, and not upon any correspondence with the title of the owner in respect of duration. A way of necessity, which rests upon implied grant, is always appurtenant, although limited by the continuance of the necessity to which it owes its existence.

The limitation of a right, in express terms, to the life of a person, may afford some ground of inference that it was intended as a personal right; but that ground of inference would be overcome, if the nature of the right and its apparent use were such as to indicate that it related wholly to the convenience or occupation of real estate. When, however, the limitation results from omitting words of inheritance by an inartificial reservation, the inference in that direction, if any can be drawn therefrom, must be very slight.

All other considerations in this case tend to support the construction adopted by the judge at the trial.

*Exceptions overruled.*

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HENRY D. EAMES & another vs. MARGARET E. COLLINS.

A. conveyed to B. a lot of land, and a building which stood more than twelve feet wide on the southwest corner thereof and extended a few feet over adjoining land of A. The deed provided that the building should so remain till removed by their mutual consent; and reserved to A. "a right of way of twelve feet in width on the southerly line of the lot." But A. had full access otherwise to his adjoining land, and there was no other land belonging to him, nor any public road, to which the way reserved would afford access. *Held*, that it did not extend under the building.

MORTON, J. This is an action of tort for the obstruction of a way claimed by the plaintiffs over land of the defendant in Mil-

ford. The obstruction complained of is a shed upon the defendant's land, which for more than thirty years has extended across the extreme westerly end of the way as claimed.

Whatever right of way the plaintiffs have over the defendant's land was created by the deed of Adam Hunt to Hiram Hunt dated November 8, 1854, in which is the following clause: "It is agreed by the parties to these presents, that the small building herein conveyed, the larger part of which is standing on the southwest corner of the above described lot, is to remain where it now stands until removed by mutual consent of the parties. The said Adam Hunt reserves to himself, his heirs and assigns, a right of way of twelve feet in width on the southerly line of this lot." At the date of this deed, the shed was in the same position it now is, except that a part of it projected over the line upon the land then owned by Adam Hunt and now owned by the plaintiffs. This part furnished a reason for the insertion in the deed of the agreement that the shed should remain where it stood until removed by mutual consent.

It will be seen that the reservation does not fix the westerly terminus of the way. It describes "a right of way of twelve feet in width, on the southerly line of this lot." It does not expressly and necessarily carry the way to the extreme westerly boundary of the defendant's lot. The question is therefore what was the intention of the parties to the deed, and in order to ascertain this the court may take into consideration not only the language of the deed, but the situation of the parties and of the thing granted, and the circumstances attending the transaction.

At the date of the deed, the convenience of Adam Hunt did not require that the way should extend to the westerly bound of his estate; he had full access to his lot, now owned by the plaintiffs, without such extension, and there was no public road and no other land of Mr. Hunt to which the way would furnish access. Both parties to the deed understood that the shed was to remain for an indefinite time. The inference is very strong, that the grantees did not intend to create a right of way over land occupied by a permanent structure. Upon the whole, we are satisfied that the deed in question did not create a right of

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way which extended under the defendant's shed ; and therefore that this action cannot be maintained. As this view is decisive of the rights of the parties, it is unnecessary to consider the other questions raised at the argument.

*Judgment for the defendant.*

*H. B. Staples*, for the plaintiff.

*H. E. Fales*, for the defendant.

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PHILEMON HILL vs. HORACE CUTTING.

A. and B., by mutual deeds of release, made partition of land which they owned in common. The deed given by A. contained a clause reserving to the grantor's use all the wood then standing on a certain lot of eight acres of the land which he released to B., with the right to the grantor, his heirs and assigns, to enter at any time and cut the wood and take it away. Each party then took and kept possession of the land released to him. A. afterwards gave C. an unsealed bill of sale of the wood on the eight acres, and C. cut the wood and took it away without B.'s knowledge. *Held*, that C. was not liable to B. for conversion of the wood.

TORT for the conversion of 4000 feet of chestnut lumber valued at \$25. The case was submitted to the judgment of the superior court, and, on appeal, of this court, upon the following facts :

On April 22, 1865, John Hill, then owning a farm of one hundred acres in Charlton, conveyed it to his two sons, John Hill, Jr., and the plaintiff, and they held it in common and undivided until May 5, 1865, when they divided it between them by mutual deeds of release and quitclaim. The deed from John Hill, Jr., to the plaintiff, after the description of the granted premises, contained this clause : "Said grantor, John Hill, Jr., reserves for his own use all the wood, timber and trees now standing and being on " a certain part, described by metes and bounds, of the land thereby granted, " containing eight acres, more or less, with the right and privilege for the grantor, his heirs and assigns, to enter on said premises at any and all times to cut and take away said wood and timber, with the privilege of crossing over the land of the grantee for that purpose." After the division, each party entered into possession of the part conveyed to him, and has kept

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Hill v. Cutting.

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it ever since. John Hill, Jr., did not enter upon the eight acres to cut any wood, but on February 5, 1870, gave a bill of sale, not under seal, of all the wood thereon to the defendant, who, without notice to the plaintiff, and without his consent or knowledge, cut and removed the lumber which is the subject of this suit, and sold the same.

*A. J. Bartholomew*, for the plaintiff.

*G. F. Verry & F. A. Gaskill*, for the defendant.

GRAY, J. The intention of the parties to the deeds of May 5, 1865, that all the wood then standing on the eight acres, which were part of the land in which John released his title to Philemon, should continue to belong to John, is sufficiently evident. The only difficulty in carrying out that intention arises out of the attempt to express it by way of exception or reservation in the deed from John to Philemon, instead of doing so by way of grant in the deed from Philemon to John. A reservation or exception can only be out of the estate granted, and this clause therefore could not operate by way of reservation or exception upon the undivided half of the eight acres which had never been in the grantor, but which was before the division and afterwards remained in the grantee. As to the other undivided half, there would seem to be no good reason why the clause should not be allowed to operate strictly as a reservation or exception. But, however that may be, it had at least the effect of a parol transfer of the wood then standing on the premises, as personal property, and a license to enter and cut the same, which was good until revoked, which was assignable without deed, and which, after it had been acted upon, and the trees cut down, by the licensee or his assignee, could not be countermanded. *Clafin v. Carpenter*, 4 Met. 580. *Nettleton v. Sikes*, 8 Met. 34. *Nelson v. Nelson*, 6 Gray, 385. *Driscoll v. Marshall*, 15 Gray, 62. *Giles v. Simonds*, Ib. 441. *Drake v. Wells*, 11 Allen, 141.

*Judgment for the defendant.*

**INHABITANTS OF DANA vs. INHABITANTS OF PETERSHAM.**

In an action between two towns to recover for expenses incurred by the plaintiffs in supporting a pauper alleged to have his settlement with the defendants, it was admitted that he had no other than a derivative settlement, and was found as a fact that he derived a settlement with the defendants from his ancestors unless his grandfather acquired one with the plaintiffs. *Held*, that the burden of proving that the grandfather acquired such a settlement was on the defendants.

Evidence that a man who resided in a town eighteen years, in occupation of real estate, was taxed there on his poll in five years of the eighteen, and also on real estate in four years of the five, and that in two of the five years his name was on the voting list of the town, is not conclusive that the taxes were paid by him.

A bond for the conveyance of land of the obligor to the obligee upon payment of a fixed sum of money within a certain time, and a lease of the land to the obligee for that time, vest no title in the freehold in the obligee.

The obligor, in a bond to convey land belonging to him to the obligee upon payment of a fixed sum of money in a certain time, holds the land subject to no trust for the obligee after the expiration of the time without the payment.

. **CONTRACT** for expenses incurred for the support of the minor children of Calvin Carter as paupers, whose settlement was alleged to be in Petersham.

At the trial in the superior court, before *Dewey, J.*, without a jury, it was admitted that the children had no other than a derivative settlement; and the plaintiffs contended and offered evidence tending to show that Calvin Carter acquired a settlement in Petersham (1) under the St. of 1865, c. 230, § 1, by serving as a soldier in the civil war upon the quota of that town, and (2) through his grandfather, John Carter. All the questions which arose concerning his service as a soldier are now immaterial. With regard to his acquiring a settlement through his grandfather, the judge found that the grandfather had his settlement in Petersham; and that Calvin Carter thereby derived a settlement there, unless his father, Silas J. Carter, acquired a settlement in a portion of the town of Dana which formerly belonged to the town of Hardwick and was set off to Dana on February 4, 1842.

The defendants contended that Silas J. Carter did acquire a settlement in this part of Hardwick (1) by having and living on a freehold estate there during three successive years, and (2) by

residing there for ten years and paying taxes for five years of the ten.

Upon the first of these issues, there was evidence of the following facts : " On January 26, 1824, Mark Haskell gave Silas J. Carter a bond for the conveyance of about seventeen acres of land in Hardwick, 'said deed to be given on or before April 1, 1827, upon the payment of \$165.43, said sum being the amount of three notes of equal amount, bearing even date with the bond, given by said Carter to said Haskell ;' and on the same day, for the stated consideration of \$19.85 paid by said Carter, gave him a lease of said premises during the term of three years from April 1, 1824."

" In April 1824 said Carter moved a small house upon the premises, called the Hoyt house, and occupied said premises with his family till March 17, 1831, when a conveyance was made by Haskell, for the alleged consideration of \$70, to Benjamin F. Carter, a brother of Silas J., of four acres of the land, including that portion on which this house stood. There was no evidence as to who made the contract to sell, or to whom the money was paid, unless a receipt of that date, on the bond of Haskell to Carter, of \$69.84, signed by Haskell, is evidence. Silas J. Carter then moved into a house which he built upon another portion of the seventeen acres, where he resided till February 1839, (said house being known as the Carter house,) when he moved to what was called the Ellsworth place. On March 2, 1836, Haskell conveyed eleven acres of land, adjoining the seventeen acre lot, to Francis S. Rogers ; and on August 24, 1836, he conveyed to said Rogers two and a half acres of the seventeen acre lot. Rogers testified that he made the trades with Carter, and paid to him for the first lot the sum of \$90, and for the second lot \$80. On January 2, 1837, Haskell conveyed to said Carter the residue of the land, nine acres, described in his bond, the consideration mentioned in the deed being \$100 ; and he continued the owner and occupant of the same till February 26, 1839, when he conveyed it to John Page, having always exercised acts of occupation and ownership of said land from April 1824 till said conveyance. On February 5, 1839, David Page gave to said Carter a bond for the convey-

ance to him of the Ellsworth farm in Hardwick, containing one hundred acres of land, to be conveyed at any time within seven years upon the payment of \$1000 with interest; and said Carter immediately thereafter moved to said Ellsworth farm, and remained in the occupation of the same till his decease in January 1842."

There was no other evidence of any payment by Silas J. Carter to Haskell for the land described in the bond which he took from Haskell; and no evidence that he ever paid anything to David Page. The defendants contended that the proof of the foregoing facts would warrant a finding that Silas J. Carter had and lived on a freehold estate in Hardwick for three successive years; and the judge so found thereon, subject to the revision of this court.

Upon the second issue, namely, as to the payment of taxes in Hardwick by Silas J. Carter, the judge found, upon evidence introduced by the defendants, that taxes were assessed on Silas J. Carter's poll, or on his poll and estate, both real and personal, in Hardwick, each year during the five years 1837-1841. There was no direct evidence that he paid the taxes; but the defendants contended that "his long residence and occupation of real estate, and the facts that he was taxed on real estate for four of the five years," including the first and last years of the five, "and that his name was on the voting list in 1839 and 1840," required a finding that they were paid by him. There was no evidence whether or not he was taxed there, or his name put on the voting list there, in any other years; and the town clerk of Hardwick testified that the books of record from which such facts were to be ascertained could not be found. The plaintiffs introduced evidence that he had a very large family and very small pecuniary means while he lived in Hardwick; and that when he died in January 1842 his real estate was appraised at only \$7, and his personal property, including all his household furniture, at \$101.86.

The judge ruled that the evidence relied upon by the defendants as conclusive of payment of the taxes by Silas J. Carter was not so; and upon the whole evidence found that it was not proved that he paid them.

By consent of the parties the case was reported for the revision by this court of the questions of law above stated, judgment to be entered for the plaintiffs or defendants according to its determination.

*P. E. Aldrich & C. Brimblecom*, for the plaintiffs.

*W. A. Field & S. Utley*, for the defendants.

AMES, J. The question whether the pauper acquired a settlement in the defendant town by virtue of his enlistment, as a part of its quota, in the military service of the United States, we do not find it necessary to consider. It is found as a fact, in the report, that his grandfather had a legal settlement in that town, of which he would have the benefit, unless his father, Silas J., acquired one afterwards in Hardwick, as claimed by the defendants. It appeared that Silas J. lived for several years in that part of Hardwick which has since been set off to the plaintiff town; and the defendants insist that in such residence he in two different ways fulfilled the conditions made necessary by the statute to the acquisition of such a settlement, namely: 1st. Having and living on a freehold estate in Hardwick three years successively; 2d. Residence in that town for ten years and payment of taxes five years of the ten.

As to the acquisition of such settlement in the second of these two modes, the report finds that it was not proved that he paid the taxes which were assessed upon him during the five years to which the evidence offered by the defendants applied. Upon this question, the burden of proof was clearly upon the defendants, and as it is not met, this specific defence falls to the ground. *Berlin v. Bolton*, 10 Met. 115, 120.

It only remains then to consider whether he acquired a settlement in Hardwick in the other mode relied upon by the defendants. According to the facts presented by the report, it is manifest that he had no freehold title, in the common law sense of the term, in the dwelling in which he resided, until January 2, 1837, that being the date of the deed from Mark Haskell to him. He removed from that place to another in the same town, on February 26, 1839, at which time he sold the house and land to John Page, thereby terminating the requisite united residence



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Dana v. Petersham.

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and ownership more than ten months before the expiration of the three years. He had no title in the new place, except a bond giving him the right of purchase on payment of one thousand dollars and interest in seven years. It was held in *West Cambridge v. Lexington*, 2 Pick. 536, that such a title is not a freehold within the meaning of the statute.

The defendants contend that he had at least an equitable estate in the land; that the legal title was held in trust for his benefit, and that so the case comes within the decision of *Randolph v. Norton*, 16 Gray, 395. In that case, a person had placed a building upon a lot of land which he had previously agreed to buy, and which he afterwards did buy and pay for, and had directed that the deed should be to a third person to whom he owed the price of the house, he taking a bond from that person for the reconveyance to himself on the payment of the debt on a day agreed upon, with interest, the occupation in the mean time being allowed to himself. It was held that this bond was really a declaration of trust. The earlier case of *Orleans v. Chatham*, 2 Pick. 29, is of the same general character. Both were cases of the pledge of property to secure a creditor, and the title of the debtor was analogous to that of a mortgagor. In both these cases, it was held that the debtor had an equitable freehold, capable of satisfying the terms of the statute as to this special mode of acquiring a settlement. But we find no case in which it has been held that the obligor in a bond to convey land on the payment of a sum of money can be said to hold in trust for the intending purchaser after the expiration of the stipulated time without the payment. None of the land was conveyed until nearly four years after the expiration of the time limited by the bond, when a portion of it was conveyed (probably at the request of Silas J.) to his brother Benjamin F., at which time a payment was made upon the bond. Another portion was conveyed about four years afterwards. But upon the facts contained in the report we see nothing in the nature of evidence that the bond was paid in full, or in such a sense that Haskell could possibly be said to hold the title in trust for Silas J. at any time before the final conveyance to him in January 1837. See *Harvey v. Varney*, 98 Mass. 118

122. The acts of ownership exercised by him are not described, and may have been such as would be naturally accounted for by the fact that he held a lease, and occupied under an expectation of purchase. Without proof that the bond had been paid, they would not be sufficient to make out an equitable title to the freehold, by virtue of which Silas J. could have acquired a settlement.

*Judgment for the plaintiffs.*

## SUPPLEMENT.

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**A woman cannot lawfully be appointed a justice of the peace, or, if formally appointed and commissioned, lawfully exercise any of the functions of the office.**

ON June 8, 1871, the following order was passed by the governor and council, and on June 10 transmitted to the justices of the supreme judicial court, who on June 29 returned the reply which is annexed :

ORDERED that the opinion of the supreme judicial court be requested as to the following questions :

*First.* Under the Constitution of this Commonwealth, can a woman, if duly appointed and qualified as a justice of the peace, legally perform all acts pertaining to such office ?

*Second.* Under the laws of this Commonwealth, would oaths and acknowledgments of deeds, taken before a married or unmarried woman duly appointed and qualified as a justice of the peace, be legal and valid ?

THE justices of the supreme judicial court, having considered the questions upon which their opinion was required by his excellency the governor and the honorable council on the eighth day of the present month, respectfully submit the following opinion :

By the Constitution of the Commonwealth, the office of justice of the peace is a judicial office, and must be exercised by the officer in person, and a woman, whether married or unmarried, cannot be appointed to such an office. The law of Massachusetts at the time of the adoption of the Constitution, the whole frame and purport of the instrument itself, and the universal understanding and unbroken practical construction for the greater part of a century afterwards, all support this conclusion, and are inconsistent with any other. It follows that, if a woman should be formally appointed and commissioned as a justice of the peace,

she would have no constitutional or legal authority to exercise any of the functions appertaining to that office.

Each of the questions proposed must therefore be respectfully answered in the negative.

REUBEN A. CHAPMAN,  
HORACE GRAY, JR.,  
JOHN WELLS,  
JAMES D. COLT,  
SETH AMES,  
MARCUS MORTON.

Boston, June 29, 1871.



# INDEX.

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## ACTION.

1. An action of tort may be maintained upon a count which alleges that the plaintiff was a manufacturer of shoes, and for the prosecution of his business it was necessary for him to employ many shoemakers; that the defendant, well knowing this, did unlawfully and without justifiable cause molest him in carrying on said business, with the unlawful purpose of preventing him from carrying it on, and wilfully induced many shoemakers who were in his employment, and others who were about to enter into it, to abandon it without his consent and against his will; and that thereby the plaintiff lost their services, and profits and advantages which he would have derived therefrom, and was put to great expense to procure other suitable workmen, and compelled to pay larger prices for work than he would have had to pay but for the said doings of the defendant, and otherwise injured in his business. *Walker v. Cronin*, 555.
2. An action of tort may be maintained upon a count which alleges that the plaintiff entered into contracts with certain shoemakers for them severally to make stock, which he delivered to them, into shoes, and return the shoes to his factory; that the defendant, well knowing this, with the unlawful purpose of preventing him from carrying on his business, induced them to return the stock unfinished to the factory, and to neglect and refuse to make it into shoes as they had agreed to do; and that the stock was thereby damaged, and the plaintiff put to trouble and expense in reasorting it and procuring it to be finished, and compelled to pay larger prices for the finishing of it than he would have done under said contracts, and by reason of the said unlawful doings of the defendant was hindered and put to expense and otherwise injured in his business. *Id.*
3. An action of tort may be maintained upon a count which alleges that a certain shoemaker was in the plaintiff's service and employment on a specified day, and for a valuable consideration on that day agreed to make three cases of shoes for the plaintiff within one month; that the defendant, well knowing this, contriving to defraud the plaintiff of the profit and benefit of said service and of the performance of said contract, did on another day, specified as being before the expiration of the month, entice and procure the shoemaker, then being in the plaintiff's service, and before he had performed said contract, as the defendant well knew, to leave the plaintiff's service and

- refuse to perform the contract, without the plaintiff's leave and against the plaintiff's will, by means of which enticement the shoemaker on the last named day did leave said service and neglect and refuse to perform said contract, without the leave and against the will of the plaintiff; and that the plaintiff thereby lost profits and benefits which would otherwise have accrued to him from said service and by the performance of said contract. *Ib.*
4. One who knowingly delivered an apparently harmless package, containing a dangerous and explosive substance, to a common carrier for transportation, without giving him notice of its contents, is liable for damages caused by its explosion while the carrier was transporting it in ignorance of its contents and with care duly adapted to its apparent nature. *Boston & Albany Railroad Co. & Carney v. Shanly*, 568.
  5. Two substances, manufactured by different manufacturers, were dangerously explosive in combination with one another, and were ordinarily used together. A customer sent separate orders to the manufacturers for quantities of the respective substances to be forwarded to him by a certain common carrier; and directed one of them to make the substance which he was to furnish of greater explosive power than usual. The orders were fulfilled, and the substances delivered in apparently harmless packages to the carrier, by the manufacturers, each of whom acted independently of the other and was ignorant of the other's proceedings; and no notice was given to the carrier of the nature of the substances or either of them. He stowed them together in his vehicle; and while he was transporting them with due care they exploded, and injured his property and property of others in his custody, and also property of a third person near which the vehicle was standing. The explosion was practically a single one, and it was impossible to distinguish how much of the damage was produced by either substance. *Held*, that the manufacturers, but not the customer, were jointly liable to the carrier and the third person respectively, in actions of tort for their injuries. *Ib.*
  6. In an action of tort for injuries occasioned to the plaintiff by the explosion in the vehicle of a common carrier of substances which the defendants had negligently delivered to him for transportation without notice of their dangerous nature, an allegation in the writ, that the action is brought for the benefit of the carrier, raises no presumption that negligence of the carrier contributed to the plaintiff's injuries, and may be rejected as surplusage; and a description in the declaration of the injuries as consisting in the destruction of "a certain building and other property of great value, belonging to the plaintiff" and situated near where the vehicle was standing at the time of the explosion, is a sufficiently definite allegation of damage. *Ib.*
- See BILL OF EXCHANGE, 1; CHECK; INTOXICATING LIQUORS, 20-22; JUDGMENT, 1; LANDLORD AND TENANT, 2; LORD'S DAY; LOST PROPERTY; MONEY HAD AND RECEIVED; NEGLIGENCE; PAYMENT; PROMISSORY NOTE, 1-4; RAILROAD, 3, 5; SET-OFF; TOWN, 2-4; TRUST, 1; WAY, 3, 4.

ADMINISTRATOR.

See EXECUTOR AND ADMINISTRATOR.

ADULTERY.

On the trial of an indictment for adultery with an unmarried woman, evidence is inadmissible that she was delivered of a child which might have been begotten about the time of the offence charged. *Commonwealth v. O'Connor*, 219.

See DIVORCE, 1; EXCEPTIONS, 8; INDICTMENT, 2.

AGENT.

See PRINCIPAL AND AGENT.

AGREEMENT.

See CONTRACT.

ALIMONY.

1. An attachment of estate of a husband upon a libel against him for a divorce is security for all sums which the wife may recover, whether for alimony or other allowance pending the suit or upon the final decree, or for costs and expenses. *Burrows v. Purple*, 428.
2. Upon a final decree granting a divorce against a husband, the court may award a gross sum to the wife in full of arrears of alimony and her costs and expenses pending the suit, and of future alimony and all expenses of maintaining children of whom she is given the custody. *Ib.*
3. A final decree, granting a divorce against a husband, and ordering that he pay a gross sum in full of allowances which the court makes to the wife, and that execution issue therefor after the expiration of forty-eight hours, authorizes the issue to her of execution in common form, upon his default to make payment within the forty-eight hours, and its levy upon any of his real estate in the manner in which like executions issued in actions at law may be levied; notwithstanding a further provision of the decree that the sum shall be paid into the hands of the clerk of the court and kept by him until the qualification of a trustee whom the decree appoints to receive and apply it for her benefit. *Ib.*

See WRIT OF ENTRY.

AMENDMENT.

A bill in equity, to wind up a partnership of the parties under written articles, was referred to a master to state an account. His report, by including certain transactions, showed a balance due to the plaintiff; and also showed that, if they were erroneously included, a balance was due to the defendant. The defendant alleged exceptions on the ground that the transactions were not within the scope of the written articles of partnership. 'At the close of



the argument of the exceptions before the full court, between three and four years after the commencement of the suit, the plaintiff gave notice that he should move to amend his bill by adding allegations which would apply to the transactions, if the exceptions were sustained. The decision sustained the exceptions; and the plaintiff filed the motion. *Held*, that as, upon the facts, it was unreasonable to doubt that the plaintiff, when he filed the bill, intended that it should apply to the transactions in dispute, and the question whether it did so was one upon which counsel might honestly differ, the amendment should be allowed, although its effect was to introduce a substantially new cause of action; but upon terms that he should pay the defendant's costs to the time of the amendment, and take no costs himself to that time if he should finally prevail; and that, as the defendant alleged that he was taken by surprise, and compelled to meet the issue of those transactions without due preparation, at the hearing before the master, the case should be reopened for a new hearing thereon, at the defendant's election. *Drew v. Beard*, 64.

See DIVORCE, 2; EQUITY, 5; TRUST, 2.

#### ANIMAL.

One on whose close hens are trespassing has no right to kill them, although, in consequence of former like trespasses, he has asked their owner to shut them up and threatened to kill them if he should not do so. *Clark v. Kellier*, 406.

See COMPLAINT; DOG; EVIDENCE, 19; FERRYMAN; LOST PROPERTY; MASTER AND SERVANT; RAILROAD, 5; WAY, 3, 4, 2, 10.

#### ANSWER.

See PLEADING, III.

#### APPRENTICE.

1. A parent with whose consent relief is furnished by a town to some of his minor children, by reason of his having a lawful settlement in the town and not being able to support them, is actually chargeable to the town so as to enable the overseers of the poor to bind his minor children as apprentices or servants, under the Gen. Sta. c. 111, § 4. *Bardwell v. Purrington*, 419.
2. An instrument executed by overseers of the poor to bind J. S. as an apprentice under the Gen. Sta. c. 111, § 4, which purports to bind him from its date until a day named, "when the said J. S. will arrive at the age of twenty-one years, during which time the said J. S. shall faithfully serve," is not wholly void because under the rule of law excluding fractions of a day in computation of time J. S. will become of full age on the day next preceding that so named, but binds him during his minority. *Id.*

See EVIDENCE, 11; PAYMENT.

## APPURTENANCE.

See WAY, 2.

## ARBITRAMENT AND AWARD.

In a case referred to three arbitrators, one party, without the knowledge of the other, wrote a letter concerning its merits to one of the three, who received it after they had finally decided the case and when nothing remained to be done but the formal drawing up and signing of their award, which required no further meeting or consultation. *Held*, that this afforded no ground for setting aside the award, which was thereupon drawn up, signed and returned in accordance with such previous decision and without the two other arbitrators knowing of the existence of the letter. *Johnson v. Holyoke Water Power Co.* 472.

## ARREST.

See EVIDENCE, 1; INDICTMENT, 4.

## ASSAULT AND BATTERY.

1. An indictment with a single count charging an assault upon two at the same time is good, and may be supported by proof of an assault upon one only. *Commonwealth v. O'Brien*, 208.
2. A rule of a Roman Catholic burial ground prohibited undertakers from officiating at funerals there without appointment of the pastor of the church, who held the fee in the land. An undertaker officiated at a funeral there in violation of the rule, and as he was rising from his knees, at the end of the service, the keeper of the burial ground, who had charge, by another rule, of all gatherings of persons in it, struck him on the shoulder, reminded him of the rule and that he had been expressly forbidden by the pastor to conduct a funeral there, and forbade his proceedings. Upon a complaint against the keeper for an assault and battery consisting in the blow, the jury found him guilty. *Held*, that this court could not hold, as matter of law that the finding was not warranted by the facts. *Commonwealth v. Dougherty*, 248.

See TRESPASS.

## ASSIGNEE OF BANKRUPT.

See MORTGAGE, 4.

## ASSIGNEE OF INSOLVENT DEBTOR.

See PROMISSORY NOTE, 12.

## ASSIGNMENT.

See DEED, 6; EQUITY, 1; TRUSTEE PROCESS, 2.

## ATTACHMENT.

See ALIMONY, 1; MORTGAGE, 1; REPLEVIN, 1.

## INDEX.

## ATTEMPT.

See SENTENCE.

## ATTORNEY AND COUNSEL.

See MONEY HAD AND RECEIVED, 2; PROMISSORY NOTE, 7.

## AUTREFOIS ACQUIT.

Under the general issue in a criminal case the defendant cannot show a former acquittal. *Commonwealth v. Chesley*, 223.

See EVIDENCE, 3.

## AWARD.

See ARBITRAMENT AND AWARD.

## BAIL.

See PERJURY.

## BAILMENT.

See ACTION, 4, 5; CARRIER, 1, 2; EMBEZZLEMENT; FERRYMAN; INTOXICATING LIQUORS, 1, 2, 6, 7; LORD'S DAY, 2; MASTER AND SERVANT.

## BANK.

See CHECK.

## BANKRUPT.

See MORTGAGE, 4, 5.

## BAR.

See JUDGMENT, 2; MONEY HAD AND RECEIVED, 2.

## BAWDY-HOUSE.

See EVIDENCE, 7.

## BILL OF EXCHANGE.

1. A merchant consigned twelve bales of cotton to a factor, and on the same day drew a bill of exchange upon him, expressed on its face to be drawn "against twelve bales of cotton," procured its discount by a bank, and advised the factor of the consignment and the draft. Upon presentment of the draft, the factor refused to accept it, and advised the merchant by letter that he did so because he had not received the bill of lading of the cotton, and that he would accept the draft when the bill was received. Two days later, he received the bill; and a few days afterwards, the bank, to which his letter had meanwhile been shown, again presented the draft to him, together with his letter and a duplicate bill of lading, and requested his acceptance, which

he again refused. Upon the subsequent receipt of the cotton, the factor sold it, and credited its proceeds to the merchant, who was his debtor to a larger amount. *Held*, that the bank could not maintain an action against the factor, either upon his promise to accept the draft, or for the proceeds of the cotton. *Exchange Bank v. Rice*, 37.

2. At the trial of an action on a bill of exchange, brought by indorsees thereof against the acceptor, to which the defence is that the payee obtained the acceptance by fraud and the other parties took the bill with knowledge thereof, the acceptor, for the purpose of showing a course of business between the indorsees and indorser by which the former were in the habit of taking negotiable paper from the latter, knowing that he was engaged in buying tainted notes and passing them to third parties so as to give a good title, may introduce evidence to show what other paper the indorsees had of the indorser, and what business they had done with him, before taking the bill in suit. *First National Bank v. Goodsell*, 149.

See CHECK; PROMISSORY NOTE.

#### BILL OF PARCELS.

See EVIDENCE, 22.

#### BILL OF PARTICULARS.

See DIVORCE, 1; MONEY HAD AND RECEIVED, 1.

#### BILL OF SALE.

See LICENSE.

#### BOND.

1. A bond for the conveyance of land of the obligor to the obligee upon payment of a fixed sum of money within a certain time, and a lease of the land to the obligee for that time, vest no title in the freehold in the obligee. *Dana v. Petersham*, 598.
2. The obligor, in a bond to convey land belonging to him to the obligee upon payment of a fixed sum of money in a certain time, holds the land subject to no trust for the obligee after the expiration of the time without the payment. *Id.*

See EXECUTOR AND ADMINISTRATOR, 2-5; PROMISSORY NOTE, 2.

#### BOUNDARY.

See DEED, 2-4.

#### BRIDGE.

See TOWN, 4.

#### BROKER.

In an action by a real estate broker on an agreement to pay him a commission upon the sale of an estate, the plaintiff contended that he was to have the

commission whether the sale was effected by him or not, and the defendant contended that the plaintiff was to have the commission only in case the sale was effected by him. *Held*, that the defendant could not introduce evidence that after the agreement with the plaintiff he promised another broker to pay him a commission to effect a sale. *Rice v. Mayo*, 550.

See **SALE**, 1.

#### BURDEN OF PROOF.

See **CARRIER**, 1; **CONTRACT**, 4; **EQUITY**, 4; **INSURANCE**, 3; **PAUPER**, 1; **TRUSTEE PROCESS**, 1.

#### BY-LAW.

See **CONTRACT**, 6; **NEGLIGENCE**, 2.

#### CARRIER.

1. In an action of contract against a common carrier for a failure to perform his ordinary undertaking of transportation, the burden is on him to prove that he failed to perform it from a cause which relieved him from liability. *Lewis v. Smith*, 334.
2. One who carries a chattel at the sole request and for the sole convenience of a bailee thereof has no lien thereon for his services, as against the owner. *Gilson v. Gwinn*, 128.
3. The terminal freight stations of two railroads in an inland city were connected by a track a mile long, part of which belonged to the first road and the rest to the second. The first road gave notice that its rate for transportation of coal from a seaport to the city would be \$1.75, and from the seaport to stations on the second road \$1.25, per ton. *Held*, that the lesser rate did not apply to coal which was ordered to be transported from the seaport to the city and delivered there at the terminal freight station of the second road, without being transferred for further transportation or delivery so as to give rise to successive charges or an apportionment of the gross freight charges between the two roads. *Wellington v. Norwich & Worcester Railroad Co.* 582.

See **ACTION**, 4-6; **FERRYMAN**; **INTOXICATING LIQUORS**, 2-4, 6, 7; **MORTGAGE**, 4-6.

#### CASES OVERRULED, DOUBTED, OR DENIED.

*DANA v. TUCKER*, 4 Johns. 487 . . . . . *Woodward v. Leavitt*, 470.  
*FERRILL v. SIMPSON*, 8 Pick. 359 . . . . . *Woodward v. Leavitt*, 465.  
*GREGG v. WYMAN*, 4 Cush. 322 . . . . . *Hall v. Corcoran*, 252.  
*GRINNELL v. PHILLIPS*, 1 Mass. 530 . . . . . *Woodward v. Leavitt*, 461.  
*TENNEY v. EVANS*, 13 N. H. 462 . . . . . *Woodward v. Leavitt*, 470.  
*WHELDEN v. CHAFFEL*, 8 R. I. 230 . . . . . *Hall v. Corcoran*, 252.

#### CHALLENGING JURORS.

See **JURY**, 1.

## CHARITABLE GIFT.

See FALSE PRETENCES, 1.

## CHECK.

The promise of a bank to one of its depositors to pay all checks which he may draw does not make it liable to an action of contract by the holder of a check afterwards drawn by him for part of the amount deposited. *Carr v. National Security Bank*, 45.

## CHILD.

See PARENT AND CHILD.

## CITY.

See TOWN.

## COMPLAINT.

A complaint for keeping or owning an unlicensed dog may allege that the unlawful act extended over many successive days, and be sustained by proof applying to any part of the period. *Commonwealth v. Canada*, 405.

See INTOXICATING LIQUORS, 3, 4, 11-17; MILK, 2.

## CONFESSION.

See CONSTITUTIONAL LAW.

## CONFUSION OF GOODS.

See REPLEVIN, 3.

## CONSIDERATION.

See CONTRACT, I.

## CONSIGNOR AND CONSIGNEE.

See ACTION, 5; BILL OF EXCHANGE, 1.

## CONSTITUTIONAL LAW.

1. The provision of the Declaration of Rights, that no subject shall be compelled to accuse or furnish evidence against himself, exempts the subject from disclosing the circumstances of his offence as well as making confession of guilt; applies to investigations ordered and conducted by the legislature, or either of its branches; is regulated therein by the same rules as in judicial or other inquiries; and is not dispensed with by any statute which fails to secure the subject from future liability, and exposure to be prejudiced, in any criminal proceeding against him, as fully and extensively as he would be secured by availing himself of the constitutional privilege. *Emery's case*, 172.

2. The St. of 1871, c. 91, is ineffectual to deprive a witness before the legislative committee on the state police of his constitutional privilege of exemption from being compelled to accuse or furnish evidence against himself, inasmuch as it leaves him liable to criminal prosecution and punishment for any matter to which his testimony may relate. *Id.*

See HABEAS CORPUS, 1, 2; JUSTICE OF THE PEACE.

### CONTEMPT.

See JUDGMENT, 1.

### CONTRACT.

#### I. *Consideration.*

1. A written proposition to pay for certain work, if the city would do it, was delivered to the city, and the city did the work. *Held*, that this was sufficient evidence of an acceptance by the city of the proposition, and that such acceptance was sufficient consideration for the promise to pay. *Springfield v. Harris*, 532.

See BILL OF EXCHANGE, 1; CHECK; CONTRACT, 5, 6; HUSBAND AND WIFE; INTOXICATING LIQUORS, 20-22; PROMISSORY NOTE, 4.

#### II. *Parties.*

See BILL OF EXCHANGE, 1; CHECK; CORPORATION; EVIDENCE, 13; FRAUDS, STATUTE OF, 2; HUSBAND AND WIFE; LORD'S DAY, 1; MORTGAGE, 2, 3; PROMISSORY NOTE, 4.

#### III. *Delivery.*

2. On an issue whether a written contract between a city and an individual was delivered by the latter, evidence that he gave it to an agent with a request to deliver it to the mayor, and that the agent put it into the hands of the mayor, will warrant a finding that it was so delivered as to bind the principal, although the agent testifies that he put it into the mayor's hands only for the purpose of allowing him to inspect it, and with the expectation that he would return it to him; and evidence of declarations and previous propositions of the mayor is inadmissible to defeat the effect of the delivery. *Springfield v. Harris*, 532.

3. In an action by a city against one of the signers of an agreement to pay for curb-stones around an inclosure if the city would lay them, it was contended in defence that the agreement was never delivered to the plaintiffs, and that an agent, to whom the person who had procured the signature of the defendant gave the agreement, put it in the hands of the plaintiff's mayor merely for his inspection. *Held*, that evidence was admissible in reply, that the defendant said that he expected to pay for the work, until the city used the inclosure for rubbish; and that the person who procured the signatures gave the agreement to the agent for the purpose of its being delivered to the mayor, and would not have given it to him unless he had supposed that he would so deliver it. *Id.*

See EQUITY, 5.

IV. *Validity.*

4. Several persons signed a writing in which they described themselves as representing a large portion of business on the line of a proposed extension of a railroad, and undertook to secure subscriptions to the stock of the railroad corporation to a certain amount, and pay for the same in instalments, and also proposed to secure the right of way for the extension of the railroad, free of expense to the corporation, and to obtain the legislation needful to carry out the proposed plan, the proposition not to be binding unless they could secure the right of way or make such arrangement in regard thereto as should be satisfactory to the corporation. The corporation accepted the proposal, having at the time no authority to extend its railroad, but subsequently obtained authority from the legislature. The signers afterwards agreed in writing that it might go forward and secure the right of way without prejudice to the rights of either party; and thereupon it purchased the right of way. *Held*, in an action by the corporation against the signers for their failure to secure the right of way, that the contract was lawful, and that the burden of showing that the defendants were unable to secure the right of way was upon them. *New Haven & Northampton Co. v. Hayden*, 525.

See APPRENTICE, 2; CONTRACT, 6; CORPORATION; DEED, 1; HUSBAND AND WIFE; INTOXICATING LIQUORS, 20-22; LORD'S DAY; MORTGAGE, 3; TOWN, 1; TRUSTEE PROCESS, 2.

V. *Construction.*

5. A written agreement, on which an action was brought, stipulated that the plaintiff should sell to the defendant "the farm now occupied by" the plaintiff and his father, for a certain price, to be paid at a future day specified, "no wood to be cut and removed from the premises save firewood for use in the house," and that on payment of the price the plaintiff would make and deliver to the defendant a deed of "the fee simple of the said premises." The declaration alleged a tender of a deed "of the premises described in the agreement," and a refusal by the defendant to pay the price. The answer denied such tender. At the trial, it appeared that the plaintiff tendered a deed, but that before the tender the buildings on the land were burned, whereby the estate was reduced in value from at least the contract price to less than two thirds of that price. *Held*, that the plaintiff could not recover. *Wells v. Calnan*, 514.
6. A. (who was one of the three directors, and also treasurer, of a trading corporation, and owned 1801 of the 3600 shares of its capital stock) made a contract, in 1865, with B., (who was, and had been for several years, a servant of the corporation, charged with important duties in its business, and paid by an annual salary,) of which they signed this memorandum: "Jan. 1, 1864, to Jan. 1, 1871. Earnings from Oct. 1, 1870, to Oct. 1, 1871, and all subsequent years, on 300 shares, to be paid to B., and said 300 shares to belong to B. but not to be transferred so long as A. desires to keep the control of the corporation, said 300 shares standing in his name and thereby giving him a majority of said shares. It is agreed that if between Jan. 1, 1864,



and Jan. 1, 1871, B. should die or leave the corporation, *pro rata* shares for the then unexpired term shall be considered as earned and due under above agreement, after Jan. 1, 1871. Whenever A. can keep the control or majority of shares and yet part with 300 shares, said 300 shares shall then be transferred to B." It was the policy of the managers of the corporation to accumulate its earnings without declaring dividends; and to interest its servants in their duties by making them sharers in the profits. B. remained in the service of the corporation until 1869, when he was dismissed from it without his fault, and although he was willing and offered to continue in it. A. took part in the dismissal, and at the same time gave B. notice to consider their contract terminated. *Held*, on a bill in equity thereupon filed by B. for the declaration against A. of a trust in B.'s favor in 300 shares of A.'s stock, (1) that the contract imported that if B. should continue in the service of the corporation until January 1, 1871, rendering services of the same general character as he had previously rendered, he should be considered as having earned the 300 shares; (2) that the contract imported a valid consideration for A.'s promise concerning these shares, in the implied agreement of B. to render future personal services to the corporation; (3) that the contract was not within the Gen. Sta. c. 105, § 6, which avoids agreements to sell or transfer shares in the stock of a corporation, unless the contracting party is at the time owner or assignee of the shares, or a duly authorized agent of the owner or assignee; (4) that the contract was also not avoided by a by-law of the corporation, that no shareholder should convey any shares, unless to his legal heirs, without first offering them to the corporation at par; (5) that the stipulation of the contract for an apportionment of the 300 shares in event of B.'s leaving the corporation was not applicable to a dismissal of B. from the service of the corporation without his fault; and (6) that the participation of A. in B.'s dismissal, and the notice which he gave to B. of a simultaneous termination of the contract, was a breach of the contract, which entitled B. to a decree declaring the trust in his favor, although the bill was filed before the time when his right to earnings on the shares was to accrue. *Held, also*, in reference to a prayer of the bill for a decree to restrain A., as owner of a majority of the shares, from permitting the corporation to carry on business unauthorized by the charter, (1) that the bill was not multifarious in seeking such relief; but (2) that it should not be granted in the absence of the corporation as a party. *Price v. Minot*, 49.

1. The plaintiff and the five defendants, by an instrument signed by them, reciting that, desiring to obtain and work a gold mine, they appointed the plaintiff their agent to go to California and make such investigations of mines as he might see fit and report, agreed that they would pay \$100 each to defray his expenses to California, and that upon his recommendation, if satisfactory to a majority of the subscribers, they would raise proportionately the money necessary to put the mine in working order; and he agreed that, if it should be decided to work the mine he might recommend, he would leave

the question of his salary open, to be decided when he should have placed the mine in working order. The subscribers also wrote a letter to him, in which they stated that it was expected of him to visit the mines in the various localities, and to avail himself of the aid of one or more of the most competent judges of mining property, before reporting; that he could not be too particular in giving all the points upon which he based his decision; that the matter of his compensation was to be left to be arranged in the future; and that he was to understand that, whatever mine they should decide to accept, it would be with the understanding that he should act as the superintendent. The plaintiff went to California, and selected a mine; but the defendants then abandoned the undertaking. *Held*, that the plaintiff was entitled to recover five sixths of such a sum as would reimburse to him his fair and reasonable expenses, and be a fair compensation for his services, although the sum should exceed the amount raised by the payment of \$100 each by the subscribers. *Duff v. Maguire*, 87.

8. A workman gave an order on his employer for forty-five dollars per month, to a shopkeeper, as security for future sales of goods by him to the workman. J. S. thereupon signed and delivered to the shopkeeper a writing in these terms: "For value received I guarantee to" the shopkeeper "that I will pay him the forty-five dollars per month, on condition that he does not carry the above order to" the workman's employer. The shopkeeper accordingly never presented the workman's order to his employer, and sold the workman goods from time to time, not exceeding forty-five dollars' worth in any month, for which the workman failed to pay and J. S. refused to pay on demand. *Held*, that the obligation of J. S. was an original promise, and not a mere guaranty of the debt of the workman; and that his liability thereon was not necessarily measured by the amount of that debt. *Thayer v. Wild*, 449.
9. In an action for breach of a written contract made in Boston by the defendants, who were coal commission merchants there and in Philadelphia, with the plaintiff, who was a coal dealer in Boston, to sell him a large quantity of coal, to be delivered free on board vessels at Port Richmond in Philadelphia, at a fixed price, and to be shipped at the plaintiff's option between the date of the contract and September 1, it appeared that on August 24 the plaintiff wrote to the defendants that he was ready to have the whole amount of coal delivered, but gave no direction where to ship it to, and it also appeared that colliers were continually plying between Port Richmond and Boston. *Held*, that the plaintiff's option was well exercised by his letter of August 24; that the defendants were bound to furnish the vessels, and ship the coal thereon for Boston, although it was impossible to ship it before September 1; and that evidence of a usage at Port Richmond to interpret similar contracts as requiring the option to be given in such season as to allow the coal to be shipped between the dates named in the contract, was inadmissible. *Snelling v. Hall*, 134.

See APPRENTICE, 2; BOND, 1; CARRIER, 3; CONTRACT, 4; DEED, 2-6; EQUITY, 3; EVIDENCE, 12; FRAUDS, STATUTE OF, 1; INSURANCE, 1, 2, 4, 5; MORTGAGE; PARTNERSHIP; SALE, 1, 2; TOWN, 2, 3.

VI. *Breach.*

See CARRIER, 1, CONTRACT, 6; DAMAGES; TRUST, 1; WAIVER.

VII. *Rescission.*

10. A dealer ordered two hundred dozen hoes to be manufactured, and delivered to him within a certain time; and the manufacturer accepted the order, with the remark that he would endeavor to fulfil it promptly. The price per dozen was stipulated in the contract; but not the time of payment. A month after the time set for the completion of the delivery, the manufacturer, having then delivered only a hundred and ten dozen, drew on the dealer for part of the price of that quantity. The dealer refused to accept the draft, and directed the manufacturer to send him no more hoes; and then, in an action brought by the manufacturer for the price of those delivered and received, sought to recoup in damages for the delay in fulfilling the order. *Held*, that the manufacturer had a right to regard the direction to send no more hoes as a rescission of the contract as to the ninety dozen undelivered; and that the dealer had no ground of exception to a ruling that the measure of his damages, as to the hundred and ten dozen, was whatever decline in their market value occurred between the time when he was entitled to their delivery and the time when they were actually delivered to him. *Clement & Hawkes Manufacturing Co. v. Meserole*, 362.

See CONTRACT, 5; DEED, 1; MONEY HAD AND RECEIVED, 1.

## CONTRIBUTION.

See PARTNERSHIP, 1.

## CORPORATION.

One who is a stockholder and director of a manufacturing corporation, and overseer of part of its business, has not thereby authority to bind the corporation to a contract to aid in the extension of a railroad. *New Haven & Northampton Co. v. Hayden*, 525.

See CONTRACT, 6; DEED, 6; DEVISE AND LEGACY, 8; EQUITÝ, 6; INTERROGATORIES, 2; MORTGAGE, 2-6.

## COSTS.

A defendant in a criminal case, who obtains by writ of error a reversal of the judgment against him and is thereupon sentenced to a lesser punishment under the Gen. Sta. c. 146, § 16, is entitled to costs under § 17. *Haynes v Commonwealth*, 198.

See ALIMONY; AMENDMENT.

## COUNSELLOR AT LAW.

See ATTORNEY AND COUNSEL.

## COURT.

See EXCEPTIONS, 8.

## CUSTOM.

See USAGE.

## DAMAGES.

1. The defendants contracted to sell and deliver a large quantity of coal to the plaintiffs' at a fixed price, in equal monthly portions, during a certain time, to be transported by vessel and rail, at the plaintiffs' expense, to their factory; and the plaintiffs agreed to receive the coal if the first cargo should prove satisfactory. *Held*, in an action to recover for a breach of the contract in delivering coal of an inferior quality, and in failing to deliver it until after the contract time, that the measure of damages for the inferior quality was the difference between the value at the factory of the coal called for by the contract and that of the coal delivered, and the measure of damages for the failure to deliver in time was not the difference in the market value, but the difference between the actual charge for freight and insurance and the average rates during the time covered by the contract, especially in the absence of evidence that the average rates were higher than the rates at the end of the contract period. *Merrimack Manufacturing Co. v. Quintard*, 127.
2. In an action to recover damages for delay in delivering coal under a contract to sell and deliver coal during the summer, freight to be paid by the purchaser, evidence is admissible that freights on coal were usually higher in the autumn than in the summer, to show what was in the contemplation of the parties, and that the loss occasioned by increase in the freight is properly to be recovered as damages. *Ib.*
3. On the trial of an action to recover damages for breach of the defendant's warranty of the quality of goods sold to the plaintiff, if a letter written by the plaintiff, which is put in evidence to show that he made a claim on the defendant for such damages, states a price for which he resold the goods, the defendant is entitled, upon request, to a ruling that the statement is no evidence of their actual value. *Aitwater v. Clancy*, 369.

See ACTION, 1-3, 6; CONTRACT, 8, 10; EQUITY, 6; EXECUTOR AND ADMINISTRATOR, 3-5; FRAUDULENT REPRESENTATIONS, 1; INSURANCE, 4, 5; JUDGMENT, 2; PROMISSORY NOTE, 4; WAIVER.

## DECEIT.

See FRAUD.

## DECLARATION.

See PLEADING, II.

## DEED.

1. If a married woman, mentally competent, joins in a deed of land by her husband, to release her dower, without duress or fraudulent misreading of the deed, and suffers it to be delivered to the grantee, she cannot avoid it on the ground that she was induced to join by fraud or undue influence of her hus-

- band or another co-grantor, without showing complicity of the grantee. *White v. Graves*, 325.
2. In a deed of land described as "bounded north of A. B.'s land," and west on a certain road, the said word "of" may be construed to mean "by," if necessary to make the whole description coherent. *Hannum v. Kingsley*, 355.
  3. By a quitclaim deed, J. S. conveyed all his right and title in real estate described as "one piece of land lying the south side of the county road," and definitely bounded; "also all the land situate and lying north of the road aforesaid, bounded north of M.'s land and west on" another road. Construing "of" in the sense of "by," in the phrase "north of M.'s land," the description included one piece of land, divided into two parcels by the county road. *Held*, that it did not also include another piece of land lying north of the county road and of M.'s land, and not bounded west on the other road. *Id.*
  4. A. B. conveyed to C. D. three adjacent lots of land for \$1600; C. D. sold the middle lot to E. F., and afterwards conveyed to the plaintiff for \$100 the eastern part of the third lot by deed describing the granted premises as bounded on the east by E. F.'s land and on the north and south by lines running to stakes and stones, "meaning to convey to" the plaintiff "one half of all that I now own of land conveyed to me by A. B., said land to be surveyed and the bounds set." The land was never surveyed, nor were bounds set. C. D. afterwards conveyed to the defendant the western part of the third lot by a warranty deed describing by metes and bounds the granted premises, which included more than half of the third lot. The plaintiff built and occupied a house on a part of the third lot east of the land covered by the description in the deed to the defendant. *Held*, that the description of the premises conveyed to the plaintiff was so uncertain, that she could not maintain trespass for acts done by the defendant on any part of the land covered by the description in the deed to him. *Harvey v. Byrnes*, 518.
  5. In a deed poll of land containing an ore-bed, a clause "reserving to" the grantor "the right of mining on the granted premises" a certain quantity of ore annually, at a certain duty per ton, licenses him to enter and mine, but saves to him no title in the land, or in the ore before it is mined and separated from the land; does not restrict the grantee from mining at the same time, even to exhaustion of the ore; and may be reformed in equity for variance through mutual mistake from the previous oral contract of the parties, as a reservation, and not an exception from the grant, and therefore not within the statute of frauds. *Stockbridge Iron Co. v. Hudson Iron Co.* 290.
  6. In a deed by a corporation of land containing a bed of iron ore, a right reserved to the grantor "of mining on the granted premises, for the use of said company," a certain quantity of ore, is assignable, and is not subject to limitation or suspensor by extrinsic evidence that the corporation was chartered to manufacture iron only in certain furnaces and work mines only for its own use, and that at the time of the deed it expected and intended to discontinue business. *Id.*

See CONTRACT, 5; EQUITY, 3-5; EVIDENCE, 8, 9; LICENSE.

DEMAND.

See EXECUTOR AND ADMINISTRATOR, 2.

DEVISE AND LEGACY.

1. A residuary gift in a will, to J. S. without words of inheritance, conveys the fee, and not a mere life estate, in land to which it applies. *Lincoln v. Lincoln*, 590.
2. A testator, in his will, gave to his daughter "four hundred dollars that she has now in her possession." At the date of the will, she had no property of the testator in her possession, nor had she from that time to his death; but a short time before the date of the will he indorsed and gave to her a promissory note of her husband for that sum. *Held*, that she had no claim against the executor for a legacy. *Snow v. Moore*, 510.
3. A testator bequeathed to his son during his life "the income of my stock" in a certain corporation, "the principal of said stock to be held by my executors during his life, and at his decease I give the same to" his surviving children. At the date of the testator's will and of his death, he owned certain shares in the stock of the corporation, and had also subscribed for shares in new stock and paid half the price thereof; but he died before the day on or before which the other half was payable, and his executors paid it and took the certificates of the new shares. *Held*, that the new shares passed by the bequest. *Emery v. Wason*, 507.
4. Under a bequest to the testator's widow of "ten dollars per year for spending money, if she should need it and call for it, to be paid to her by the executor," her call for the money is conclusive of her need of it, and by omitting to call during any one year she does not forfeit the right to take payment for that year afterwards. *Conant v. Stratton*, 474.
5. A bequest to the testator's widow of "a good and comfortable support and maintenance, both as to food, clothing and nursing in health and sickness at his house," includes a proper supply of fuel, and the necessary expenses of keeping the house in tenable and comfortable condition. *Id.*
6. The fact that a testator's widow owns a small amount of property in her own right is immaterial in determining what is due under his bequest to her of "a good and comfortable support and maintenance, both as to food, clothing and nursing in health and sickness at his house." *Id.*

See EXECUTOR AND ADMINISTRATOR.

DIVORCE.

1. It is discretionary with the court, on the trial of a libel for divorce for the cause of adultery, to order further specifications of the alleged criminal act. *Harrington v. Harrington*, 329.
2. It is discretionary with the court to allow a libel for divorce to be amended without terms during the trial. *Id.*

See ALIMONY; EXCEPTIONS, 8; WRIT OF ENTRY.

## DOG.

The owner of a dog not licensed as required by the St. of 1867, c. 130, §§ 1, 2 is not liable to a penalty under § 5, if he is not the keeper of the dog. *Commonwealth v. Canada*, 405.

See COMPLAINT.

## DOWER.

See DEED, 1.

## EASEMENT.

See LICENSE; WAY, 1, 2.

## ELECTION.

See EXCEPTIONS, 6; INDICTMENT, 3.

## EMBEZZLEMENT.

If one who is employed by the maker of a promissory note, not as a broker but merely to sell it and receive the proceeds and pay them over specifically to a third person, fraudulently converts them to his own use, he is guilty of embezzlement, although, upon receiving the note, he gave to the maker his own note for the same amount, if it was agreed that his note should be deposited with the third person as a receipt, to be given up to him upon his paying over the said proceeds. *Commonwealth v. Foster*, 221.

## EQUITY.

1. The inventor of a machine agreed with a mechanic, that the latter should perfect it, procure a patent for it, and assign the patent to him. The mechanic procured the patent, but refused to assign it. *Held*, that this court had jurisdiction in equity to compel the assignment. *Binney v. Annan*, 94.
2. A. and B. were partners; and B. was a minor. Both of them knowing that the firm was insolvent, B. sold his interest in its property to A., who soon filed a petition for the benefit of the insolvent law individually and as a member of the firm. An assignment of the estate in insolvency was made, and certain creditors proved claims, with the understanding, and by a direction of the judge of insolvency, that the question whether they should be allowed against the estate of the firm, or A.'s separate estate, should be reserved for future determination. Pending these proceedings, B. became of age; and thereupon these creditors brought actions at law against A. and B. upon the same claims, and B. pleaded his infancy in defence. Pending the action, the judge of insolvency, upon a petition of the assignees presented before the actions were brought, decreed, after hearing all parties in interest, that the funds in the hands of the assignees, including those derived from B.'s sale to A., were A.'s separate estate, and that the claims of the said creditors were provable only against the estate of the firm. No appeal was taken from the decree, and, with knowledge of it, these creditors, in their

actions at law, discontinued against B. because of his defence, and recovered judgment against A. *Held*, that a bill in equity filed by them more than a year after the recovery of the judgments, for a revival of the decree of the judge of insolvency both as to marshalling the assets and determining against which estate their claims should be allowed, was filed too late. *Conant v. Perkins*, 79.

3. If one of the parties to a deed which was intended and understood by both of them to conform to a previous contract, but fails to do so, delays, in an honest and reasonable reliance upon their original construction of the deed, to bring a suit in equity to reform it, for several years after he has notice that the other party denies that construction, the delay is not imputable to him as laches, in defence against the suit. *Hudson Iron Co. v. Stockbridge Iron Co.* 290.
4. To a bill in equity filed by the grantor to enforce a reservation in a deed, the grantee answered that the terms of the reservation were inserted by a mutual mistake of the parties and defeated their intention; and filed a cross bill to reform the deed upon a like allegation. *Held*, on the trial of issues for a jury upon the cross bill, that the grantee had no ground of exception to instructions to the jury that the intention and mistake must be proved beyond a reasonable doubt, and that, in such a case, this meant a degree of proof which they would act upon in the most important affairs of life, and which would satisfy their judgments and consciences of the fact to be proved. *Id.*
5. In a bill in equity filed by the grantor of land containing an ore-bed, to enforce a reservation in the deed, of a right to mine a certain quantity of the ore, the grantee answered that the parties intended to insert in the deed a limitation of the right to the supply of certain furnaces and omitted to do so by mutual mistake; and filed a cross bill to reform the deed upon a like allegation. Upon the cross bill, the court framed an issue for the jury, Did the parties intend to insert in the deed, and omit to do so by mistake, a clause by which the right was limited to the supply of the furnaces? And at the trial, upon motion of the grantee, and against the objection of the grantor, a second issue was ordered, Was it the understanding, intent and agreement of the parties, that by the contract of purchase and sale of the land the right was limited to the supply of the furnaces, and was the deed delivered and accepted in the belief and with the understanding that it gave legal effect to such understanding, intent and agreement? At the close of the evidence, the grantor contended that it showed that the parties agreed to deliver and accept the deed in its present form after a discussion of the question whether its terms did limit the right to the furnaces; whereupon the judge ordered a third issue, Was the deed delivered and accepted with the mutual intention and understanding that it should be and was in its present form, after the question whether its terms so limited the right had been raised and discussed between the parties? The grantee objected to the submission of this issue; but did not offer, or ask time, to introduce



further evidence. The jury answered the first issue in the negative, and the third in the affirmative, and failed to agree upon the second. *Held*, (1) that the submission of the third issue to the jury was a proper exercise of the discretion of the judge; (2) that the second issue was single in law, though depending on two propositions of fact; (3) that the cross bill should be allowed to be amended by adding the allegations of an agreement of the parties antecedent to and independent of the deed, necessary to constitute one of the propositions, the suit having so far proceeded with no objection on the part of the grantor that the cross bill was defective in that particular; and (4) that the second issue was not rendered immaterial by the verdicts upon the first and third issues, but its determination under the amended cross bill was essential to the decision of the suit. *Ib.*

6. In a suit in equity to compel the defendants to account for shares in the stock of a corporation, alleged to have been obtained by them in fraud of the plaintiffs, wherein it is decreed that one of them, while acting as agent of the plaintiffs, united with the other, who knew of that relation, as partners in obtaining the shares, to which the plaintiffs were in equity entitled, they are liable to account therefor both jointly and severally; may be decreed to replace the shares to the plaintiffs, to the extent of other like shares held by them at the time of the filing of the bill; and if one of them dies after the said interlocutory decree, and while the case is referred to a master to state the account, and the other is fully heard before the master and afterwards before the court on exceptions to his report, the final decree for the plaintiffs should be entered *nunc pro tunc*, as of the date of that decree. *Emery v. Parrott*, 95.
7. The report of a master in chancery on questions of fact referred to him, depending upon conflicting evidence, is not conclusive, although every reasonable presumption is to be made in its favor; and if the evidence clearly shows that he is mistaken in his conclusions, the court will set them aside upon exceptions. *Drew v. Beard*, 64.

See AMENDMENT; CONTRACT, 6; DEED, 5; INSANE PERSON; MORTGAGE, 4, 5; PARTNERSHIP, 1; TRUST, 2.

### ESTATES OF DECEASED PERSONS.

See DEVISE AND LEGACY; EXECUTOR AND ADMINISTRATOR.

### EVIDENCE.

1. At the trial of an indictment for the murder of a constable, it appeared that the deceased was killed while attempting to arrest the defendant upon a warrant which bore an indorsement signed by a deputy sheriff to the effect that he had arrested the defendant and had him before the magistrate who issued the warrant. *Held*, that parol evidence was admissible to prove that the warrant was never served by the deputy sheriff, that the defendant was never arrested or brought judicially before the magistrate, and that the war-

- rant, though given up by the deputy sheriff to the magistrate, was by the latter returned to him for service and by him given to the deceased; and that these facts, if proved, showed that the warrant was sufficient in the hands of the deceased to authorize the arrest of the defendant. *Commonwealth v. Moran*, 239.
2. On the trial of an indictment for a libel, evidence is admissible to show that the words "State Cop." in the libellous writing mean a deputy of the constable of the Commonwealth. *Commonwealth v. Morgan*, 199.
  3. On the trial of an indictment, testimony that the evidence in support of it was the same as that in support of a former indictment, on which the defendant was acquitted, is inadmissible, if the record shows that the acquittal was on the ground of a variance. *Commonwealth v. Chesley*, 223.
  4. At the trial of an indictment for falsely swearing that the defendant owned a dwelling-house, evidence was introduced tending to show that the house was devised to the defendant's wife. *Held*, that the testimony of a witness was admissible that he had examined the indexes in the registry of deeds from before the date of the devise to the present time, and found no conveyance of the house to the defendant or any one else. *Commonwealth v. Hatfield*, 227.
  5. At the trial of an indictment for illegally keeping and maintaining a tenement in Boston, the jury are authorized to infer that witnesses who testified that the tenement was on India Wharf meant India Wharf in Boston. *Commonwealth v. Ackland*, 211.
  6. On the trial of an indictment, the omission of any direct testimony to the time of the commission of the offence, except a statement of the principal witness for the Commonwealth that he thinks it was committed on a certain day, which was in fact after the finding of the indictment, does not entitle the defendant to a ruling that there is no evidence to warrant a conviction, if there is other evidence, tending to identify the offence testified to with the offence charged, and sufficient to warrant the jury in finding that the witness was mistaken in time, and that it was committed before the indictment was found. *Commonwealth v. Irwin*, 401.
  7. At the trial of a complaint for keeping a tenement resorted to for prostitution and lewdness, it appeared that the defendant also kept, adjoining but not communicating with the tenement, a shop with a room leading out of it; that the shop was resorted to by women reputed to be prostitutes, and men whose conduct with them was unchaste; and that persons reputed to be unchaste went from the shop to the tenement. *Held*, that an admission of the defendant that the room leading from the shop was let by him for prostitution was admissible in evidence. *Commonwealth v. Dam*, 210.
  8. Extrinsic evidence is inadmissible to vary the construction of a deed, as between a third person and the grantee. *Hannum v. Kingsley*, 355.
  9. On the trial of an action to avoid a deed upon the ground of mental incapacity of the grantor at the time of its execution, evidence of the condition of his mind a year afterwards may be excluded, in the discretion of the judge, as too remote. *White v. Graves*, 325.

10. The schedule of assets filed by an insolvent debtor is competent evidence that at the time of filing it he did not own property not included therein. *Woodward v. Leavitt*, 453.
11. In an action to recover for work done for the defendant by an apprentice bound to the plaintiff by an instrument executed by overseers of the poor under the Gen. Sts. c. 111, § 4, which recites that the minor's father is "actually chargeable" to the town as having a lawful settlement therein, such recital is *prima facie* evidence of the fact recited. *Bardwell v. Purington*, 419.
12. In an action by A. on B.'s promissory note, in defence against which B. sets up that he sold stock in the Ohio and Mississippi Railroad Company to A. for a sum to be ascertained and indorsed on the note, parol evidence is not competent to vary a memorandum signed by the parties that "A. takes B.'s Ohio & Miss. stock for \$5100 & odd dollars, to be ind. on B.'s note on date" of the sale; and the construction of the memorandum, as a contract, is for the court and not the jury, if there is no dispute as to the significance of the abbreviations, or the number of dollars more than \$5100, and less than \$5200, or the specific note, referred to therein. *Colt v. Cone*, 285.
13. In an action for the price of goods sold and delivered, which is charged on the plaintiff's books of account as due to himself and a third person as partners, it is competent for him to prove that he was sole owner of the goods at the time of their sale, and explain the form of the entry by oral testimony that the books were opened at a time when he was under a conditional agreement to admit the third person as a partner in his business, and that the condition was not fulfilled. *Langdon v. Hughes*, 272.
14. On the trial of an action upon a promissory note, the plaintiff testified to admissions of the defendant in a conversation with him, in proof of the signature; and it appeared that at the end of the conversation there was an understanding between the parties that they should have another interview concerning the note, and that such an interview was had after the action was brought; but the plaintiff did not testify to what occurred at it. *Held*, that it was not competent for the defendant to prove what he said at this interview, either by cross-examination of the plaintiff, or by his own testimony. *Adam v. Eames*, 275.
15. At a trial, the defendant, to show that testimony of the plaintiff as to the time when he bought a promissory note was not to be relied on, put in evidence answers of the plaintiff to interrogatories filed in the case, in which he stated that he bought it at a different time. The plaintiff, on re-examination, offered to testify that he was mistaken in his answers to the interrogatories, and that, as soon as he discovered his mistake, he informed his counsel, in order that it might be corrected. *Held*, that this testimony was admissible, although the plaintiff had not asked leave to amend his answers. *Blake v. Stoddard*, 111.
16. In an action against an executor by the testator's son-in-law for board furnished to the testator, to which the defence is that he was a visitor with the

- plaintiff, and that the plaintiff's claim originated in disappointment at his wife's receiving less property under the will than the testator's other child, the defendant may introduce evidence of the amount of the testator's property, for the purpose of showing that the plaintiff's wife, who had a specific legacy, took less than the other child, who was residuary legatee. *Snow v. Moore*, 512.
17. In an action against an executor by the testator's son-in-law for board furnished to the testator, to which the defence was that he was a visitor and not a boarder with the plaintiff, the plaintiff's wife testified that the testator was "feeble, in poor health, lame and of no great value for work." *Held*, that, to contradict this testimony, evidence was admissible of her statement that "she and her husband wished her father to come and live with them, because it would save their hiring a man." *Ib.*
18. In an action against an executor for board furnished to his testator, the defendant testified that it was worth only a certain sum per week to board the testator. *Held*, that the plaintiff might prove that the defendant had paid a bill for the testator's board for the preceding year at a higher rate per week. *Ib.*
19. Evidence of how much hay an ordinary horse will eat in a week is incompetent on the question how much hay was eaten in eight weeks and a half by a horse which was not in an ordinary condition. *Carlton v. Hescox*, 410.
20. On the trial of an issue whether goods delivered by the plaintiff to the defendants were accepted by them, they called as a witness their agent, to whom the delivery was made, and asked him whether he ever accepted the goods. The judge excluded the question; but ruled that they might show what was done, or what was not done, by them in reference to the goods. *Held*, that they had no ground of exception. *Brewer v. Heusatonic Railroad Co.* 277.
21. In an action for the price of goods sold and delivered under a special contract, there was no dispute as to the contract price of the goods stipulated to be delivered, but the defendants contended that those actually delivered were of inferior quality and were not accepted. *Held*, that evidence of what the goods delivered were worth was admissible on this issue. *Ib.*
22. An ordinary bill of the parcels, receipted by the seller of goods, is not such a memorandum of the contract of sale as will bar the buyer from proving by parol evidence a warranty of their quality. *Atwater v. Clancy*, 369.
23. The testimony of experts is competent on the questions, whether it is possible to examine all the layers in a case of old tobacco without injuring the tobacco, what is the proper method of examining such a case to determine the kind and quality of the tobacco, and whether it is a usage of the trade to buy old tobacco by sample. *Ib.*
24. The testimony of a witness, called as an expert upon the question what is the proper way to examine a case of tobacco, is admissible, that it is "to open the case, get down into it, be sure you have the average of the sweat of it, then draw three or four hands, and ask the man if this is the average of his crop." *Ib.*

25. No exception lies to the exclusion of evidence of the quality of part of a lot of goods as a sample of the whole, if it does not appear that the person who selected it was competent to judge of its comparative quality. *Brown v. Leach*, 364.
26. In an action for setting a fire on the defendant's land so negligently that it spread to the plaintiff's land and burned his timber, the opinion of a person experienced in clearing land by fire, that there was no probability that a fire set under the circumstances, as described by the witnesses, would have spread to the plaintiff's land, is inadmissible to disprove negligence on the part of the defendant. *Higgins v. Dewey*, 494.
- See ADULTERY; ASSAULT AND BATTERY, 1; AUTREFOIS ACQUIT; BILL OF EXCHANGE, 2; BROKER; COMPLAINT; CONSTITUTIONAL LAW; CONTRACT 1-3, 9; DAMAGES, 2, 3; DEED, 6; EQUITY, 4, 7; EXCEPTIONS, 1-4, 7-9; FALSE IMPRISONMENT; FALSE PRETENCES, 2; FERRYMAN; FRAUDULENT REPRESENTATIONS, 2; INDICTMENT, 2-5; INSURANCE, 3; INTOXICATING LIQUORS, 7-9, 12, 14-17, 19; JURY, 2-4; LIBEL, 1-3; MILK, 1; PARTNERSHIP, 2; PAUPER; PERJURY, 2, 3; PRINCIPAL AND AGENT; PROMISSORY NOTE, 7-13; RAILROAD, 2, 4; SALE, 2-4; TOWN, 2; TRUSTEE PROCESS, 1; WAY, 7, 9-12; WITNESS.

## EXCEPTIONS.

1. No exception lies to the ruling of the presiding judge as to the order of introducing evidence at a trial. *Commonwealth v. Dam*, 210.
2. Allowing a witness, on a trial, to use a map not verified by oath, to point out to the jury, of his own knowledge, the location of a way, is within the discretion of the judge, and affords no ground of exception. *Commonwealth v. Holliston*, 232.
3. The mere fact that a witness at a trial was allowed to give his opinion of the meaning of initials marked on a barrel affords no ground for sustaining a bill of exceptions which does not show that such testimony was incompetent or was material. *Commonwealth v. Jennings*, 486.
4. In an action on a judgment recovered in another state in a suit for the use and occupation of a house, the only issue to the jury was whether the defendant was served with process or appeared in said suit, and he was called as a witness. *Held*, that allowing him to testify that he was not a resident of said state, but was there as an officer of the army, and occupied the house as military quarters assigned to him by his superior officer, afforded no ground of exception. *McDermott v. Clary*, 501.
5. On the trial of an action against a town for an injury received by a traveler whose horse slipped in a highway and was drawn backwards over a bank by the weight of the wagon, whereby he was thrown out and injured, if the judge requires the jury to find that the want of a sufficient railing along the bank was the sole cause of the injury, in order to return a verdict for the plaintiff, the defendants have no ground of exception to his refusal of rulings as to whether the highway was defective from the nature of its material at the place where the horse slipped. *Lyman v. Amherst*, 339.

6. If a plaintiff joins a count in tort with a count in contract for the same cause of action, it is discretionary with the court to permit him to go to the jury upon both. *Atwater v. Clancy*, 369.
7. Rulings on the competency of evidence offered upon a motion for a new trial are subject to revision on exceptions. *Woodward v. Leavitt*, 453
8. On a trial by jury of a libel for divorce for the cause of adultery, at which the libellant, the libellee and the alleged paramour of the libellee were all witnesses, the judge instructed the jury that formerly it was thought unsafe to permit parties to testify, for fear that in the infirmity of human nature they would not tell the truth; that criminals especially were formerly not allowed to testify in their own behalf, because it was said by many that it would be a mere farce to allow them to do so, that a man who committed a crime would surely lie about it, a man charged with adultery would swear he was not guilty, to shield himself, and, under a false sentiment of honor, to screen his paramour, and a woman who was so depraved as to commit adultery would have no other course but to deny it, for to stay away would be confession; and that, in view of these suggestions, such testimony was to be received with care; but that the questions of fact and the credit due to witnesses were solely for the jury, and he intended to express no opinion in regard to them. *Held*, that the instructions afforded the libellee no ground of exception under the Gen. Sts. c. 115, § 5, as a charge to the jury with respect to matters of fact. *Harrington v. Harrington*, 329.
9. Upon a bill of exceptions to a ruling excluding evidence of the quality of part of a lot of goods as a sample of the whole, it is not competent to argue that the evidence was admissible to show the quality of that part in itself. *Brown v. Leach*, 364.

See DIVORCE; EQUITY, 7; EVIDENCE, 9; FERRYMAN, 2; INTERROGATORIES, 3; INTOXICATING LIQUORS, 18; PERJURY, 1; PROMISSORY NOTE, 9, 11, 12; REPORT; TOWN, 2; WITNESS, 3.

## EXECUTION.

See ALIMONY, 3; EXECUTOR AND ADMINISTRATOR, 1, 3; WRIT OF ENTRY.

### EXECUTOR AND ADMINISTRATOR.

1. A testator devised to his wife one third of his real estate during her life; authorized his executor to sell any or all of his real estate at such times and in such portions as he should judge most for the interest of those concerned; and if his wife should not desire to occupy one third of his real estate, then he directed the executor to sell the whole of his real estate as soon as it should be deemed best, invest the proceeds, and pay over to her the income of one third thereof during her life. The wife occupied the real estate from the time of the testator's death. Some years after his death, one undivided third of the real estate for her life was set off on an execution against her, and afterwards the executor sold the whole real estate under the power

- in the will. *Held*, that the execution creditor had no title in the land against the executor's grantee. *Mayo v. Merritt*, 505.
2. After judgment for the plaintiff in an action brought by a legatee in the name of the judge of probate on a bond given by the executor under the Gen. Sts. c. 93, § 8, it is too late for the defendant to object that the action could not be maintained for want of a previous demand on him for the legacy. *Conant v. Stratton*, 474.
  3. Upon a judgment for the plaintiff in an action brought in the name of the judge of probate on a bond given by an executor under the Gen. Sts. c. 93, § 8, for the executor's neglect to pay a legacy, damages are to be assessed, and execution is to issue, for the amount due upon the legacy to the date of judgment, without reference to the amount of the estate in the executor's hands. *Ib.*
  4. In assessing damages for the breach of an executor's obligation to provide "a good and comfortable support and maintenance" for a legatee "as to clothing," the allowance of clothing due to the legatee may be computed at an annual sum. *Ib.*
  5. In assessing damages for the plaintiff in an action brought in the name of the judge of probate by a testator's widow for a breach of a bond given by the executor under the Gen. Sts. c. 93, § 8, consisting in his refusal to fulfil a legacy of a comfortable support and maintenance to her at the testator's house, a sum may be included for her discomfort and inconvenience through the defendant's neglect to keep the house in repair, and also whatever amount is needful to make it habitable and comfortable. *Ib.*

See DEVISE AND LEGACY, 2-6; SET-OFF.

#### EXPERTS.

See EVIDENCE, 23-26.

#### EXPRESS COMPANY.

See MORTGAGE, 4-6.

#### FALSE IMPRISONMENT.

In support of an action for causing the plaintiff to be unlawfully imprisoned evidence is competent that the defendant, as a trial justice, suffered the plaintiff, whom he had sentenced to pay a fine and costs, to go at large, and ten weeks afterwards, the fine and costs remaining unpaid, committed him to jail upon a mittimus, for the purpose of extorting money from him. *Fisher v. Deane*, 118.

See HABEAS CORPUS, 1, 2, 5.

#### FALSE PRETENCES.

1. An indictment will lie on the Gen. Sts. c. 161, § 54, for obtaining money as a charitable gift by false pretences. *Commonwealth v. Whitcomb*, 486.
2. An indictment for obtaining money under false pretences alleged that the

defendant, intending to cheat B. H., falsely represented to her that he had a lease of a building which he was authorized to assign to her; that by these representations she was induced to, and did, purchase and receive his pretended right and estate in said building, and to hire, and did hire, said building of him, "and to pay and deliver, and did pay and deliver," to him certain moneys; and that he sold, assigned and delivered his pretended right, and let said building, and "did then and there receive and obtain" the said moneys. No objection was made to the sufficiency of the indictment. *Held*, on the trial, that evidence as to what B. H. paid the money for, and what it was received for, was admissible. *Commonwealth v. Chesley*, 223.

See FRAUDULENT REPRESENTATIONS.

### FALSE REPRESENTATIONS.

See FALSE PRETENCES; FRAUDULENT REPRESENTATIONS.

### FENCE.

See RAILROAD, 5; WAY, 6, 7, 9, 10.

### FERRYMAN.

1. In an action against a ferryman, on his contract for the transportation of animals which fell off the ferry boat and were drowned, through his alleged carelessness in not furnishing the boat with a barrier where they fell, evidence is inadmissible that just such a boat had been used to transport animals over the ferry daily for thirty years, and no accident had ever occurred before. *Lewis v. Smith*, 334.
2. In an action against a ferryman, on his contract for the transportation of a team of mules which fell off the ferry boat and were drowned, through his alleged carelessness in not furnishing the boat with a barrier where they fell, a refusal of a ruling that, if the loss was occasioned wholly by the fault of the mules, the defendant was not liable, affords him no ground of exception, if the only sense in which the ruling was applicable to the evidence was, that the defendant was not liable if the mules started back and forced themselves into the water without any known or apparent cause. *Id.*

### FINDER OF PROPERTY.

See LOST PROPERTY.

### FIRE.

See CONTRACT, 5; EVIDENCE, 26; NEGLIGENCE, 1; PLEADING.

### FIRE INSURANCE.

See INSURANCE, I.

### FOREIGN LAW.

See JUDGMENT, 1.



## FORMER ACQUITTAL.

See AUTREFOIS ACQUIT.

## FRAUD.

See ARBITRAMENT AND AWARD; BILL OF EXCHANGE, 2; DEED, 1; EMBEZZLEMENT; EQUITY, 6; FALSE IMPRISONMENT; FALSE PRETENCES  
FRAUDULENT REPRESENTATIONS; INTOXICATING LIQUORS, 1.

## FRAUDS, STATUTE OF.

1. An oral contract for the delivery of a certain number of feet of plank by A. to B. for the price of more than fifty dollars is a contract for the sale of goods within the statute of frauds, although it is stipulated that A. shall "saw the logs into plank of various dimensions under B.'s direction." *Clark v. Nichols*, 547.
2. A. sold goods to B. and C. jointly. D., for a valuable consideration moving from B. and C., promised them to pay for the goods. And A., at D.'s request and with his knowledge, cancelled the charges for the price of the goods on his books, which were made in part against B. and C., and in part against C. alone, by transferring them to the account of D. Held, that the statute of frauds was no bar to an action by A. against D. for the price of the goods. *Langdon v. Hughes*, 272.

See CONTRACT, 6; DEED, 5.

## • FRAUDULENT REPRESENTATIONS.

1. If a seller of goods deceives the buyer as to their quality, the buyer cannot avail himself of the deceit in defence against an action for their price, or in reduction of damages therein, if the quality was open to his own observation and with ordinary diligence and prudence he could have ascertained it. *Brown v. Leach*, 364.
2. In an action for deceit in the sale of a horse, the defendant may prove a conversation which occurred at the time when he himself bought the horse between him and the person from whom he bought it and derived all his knowledge of it. *Beach v. Bemis*, 498.

See FALSE PRETENCES.

## GIFT.

See FALSE PRETENCES, 1.

## GOODS SOLD AND DELIVERED.

See EVIDENCE, 13, 20-22.

## GUARANTY.

See CONTRACT, 8.

## GUARDIAN AND WARD.

See HABEAS CORPUS, 1, 2, 5; INSANE PERSON.

## HABEAS CORPUS.

1. This court, or a justice thereof, has jurisdiction, upon the petition of a minor or of his father, to issue a writ of *habeas corpus* to inquire into the validity of his imprisonment or detention in this Commonwealth under an alleged enlistment in the army of the United States, and, if the enlistment be found to be illegal, to discharge him from the custody of the military officer holding him. *McConologue's case*, 154.
2. The acts of congress of 1864, cc. 13, 237, authorizing and directing the secretary of war to discharge minors enlisted without the consent of their parents or guardians, do not affect the jurisdiction of the courts to discharge them upon *habeas corpus*. *Ib.*
3. The judicial discharge of a person upon *habeas corpus* conclusively determines that he was not liable to be held in custody upon the state of facts then existing. *Ib.*
4. The omission of the person in whose custody the prisoner is found to make the written statement or return required by the Gen. Sts. c. 144, § 12, to a writ of *habeas corpus*, does not impair the effect of a discharge ordered by the court or judge after hearing both parties. *Ib.*
5. The decision of a justice of this court upon a writ of *habeas corpus*, discharging a person from detention under his enlistment in the army of the United States, upon the petition of his father alleging him to be a minor enlisted without his consent, and after the military officer detaining him has appeared and been heard, is conclusive that he was a minor, and not subject to be held as a soldier either by virtue of his enlistment or under any previous arrest or charge for desertion; and entitles him to be again discharged upon a writ of *habeas corpus* granted on his own petition, if he is retaken by the military officer upon either of those grounds, or under a subsequent despatch from the secretary of war directing him to be arrested wherever found and sent out of this state. *Ib.*

## HENS.

See ANIMAL.

## HOLIDAY.

See INDICTMENT, 1; LORD'S DAY.

## HUSBAND AND WIFE.

The promise of a married woman as surety for her husband, without any consideration received by her or benefit to her separate estate, cannot be enforced as a contract in reference to her separate property under the Gen. Sts. c. 108, § 3. *Athol Machine Co. v. Fuller*, 487.

SEE ALIMONY; DEED, 1; LANDLORD AND TENANT, 1.

## ILLEGAL CONTRACT.

See INTOXICATING LIQUORS, 20-22; LORD'S DAY.

## INDICTMENT.

1. An indictment, purporting to have been found at the term begun and holden on the first Monday of July of a court which is required by law to begin and hold a term on the first Monday of every month, is not necessarily vitiated by the fact that the said Monday was the fourth day of July. *Commonwealth v. Chamberlain*, 209.
  2. A conviction may be had on an indictment, although it appears at the trial that the crime was not committed on the day alleged therein, and it is not proved on what day it was committed, if it is proved to have been committed before the finding of the indictment and five or six weeks before the trial. *Commonwealth v. Dacey*, 206.
  3. At the trial of an indictment for adultery, a witness having testified to several acts of adultery with the defendant, and among them to one committed on a certain day and at a certain hour and place, the district attorney elected to go to the jury on that one. The Commonwealth introduced evidence to show the loss by the defendant of a ticket under circumstances tending to corroborate the witness as to the commission of the adultery at the hour and place testified to, but showing that the ticket was lost on another day. The district attorney then stated that he elected to go to the jury on the adultery committed when the ticket was lost. *Held*, that the evidence was admissible, and the district attorney was entitled so to elect. *Commonwealth v. O'Connor*, 219.
  4. An indictment for attempting forcibly to rescue a prisoner, held in the lawful custody of a police officer on a charge of breaking and entering a dwelling-house with intent to steal therein, is not defective for omitting to state the process on which the prisoner was held in custody, and the nature and circumstances of the holding; and proof that the officer arrested him in the dwelling-house on a charge of breaking and entering it and stealing therein is not a variance. *Commonwealth v. Lee*, 207.
  5. An indictment under the Gen. Sta. c. 161, § 85, for wilfully and maliciously "injuring" dresses, can be maintained without an averment that they were destroyed, although the evidence shows that they were so injured as to be unfit for further use, and worthless as dresses. *Commonwealth v. Sullivan*, 218.
- See ASSAULT AND BATTERY, 1; AUTREFOIS ACQUIT; COMPLAINT; EVIDENCE, 2, 3, 5, 6; FALSE PRETENCES; MILK; PERJURY; RAILROAD, 1  
VARIANCE; WAY, 5.

## INFANT.

See APPRENTICE; EQUITY, 2; HABEAS CORPUS, 1, 2, 5; NEGLIGENCE, 2  
RAILROAD, 2.

## INFORMER.

See MILK, 2.

INSANE PERSON.

If a resident of another state becomes insane pending a suit in equity against him in this Commonwealth, the appointment by the court of his counsel to be his guardian *ad litem* justifies proceeding without notice to a guardian previously appointed in the state of his domicil. *Emery v. Parrott*, 95.

See EVIDENCE, 9.

INSOLVENT DEBTOR.

See EQUITY, 2; EVIDENCE, 10; PROMISSORY NOTE, 10, 12; TRUSTEE PROCESS, 2.

INSURANCE.

I. *Fire Insurance.*

1. The liability of a mortgagee as indorser of the mortgage note to an assignee of the mortgage gives him an insurable interest in the mortgaged property. And that interest is sufficiently described by calling him "mortgagee," in a policy of insurance, which provides that if the interest of the assured in the property is any other than entire, unconditional and sole ownership, it shall be so expressed, and that his interest, whether as owner, trustee, consignee, factor, agent, mortgagee, lessee or otherwise, shall be truly stated therein. *Williams v. Roger Williams Insurance Co.* 377.

See INTERROGATORIES, 1, 2.

II. *Marine Insurance.*

2. A policy of marine insurance upon champagne wine, valued by the case, contained printed clauses providing that the insurers should not be liable for loss by leakage, unless occasioned by stranding or collision; nor "for damage or injury to goods by dampness, rust, change of flavor, or by being spotted, discolored, musty or mouldy, unless the same be caused by actual contact of sea water with the articles damaged, occasioned by sea perils." A vessel with such wine on board met with severe gales and stress of weather, which prolonged her voyage and caused her to ship much sea water; and upon her arrival at the port of destination all the cases were found to be more or less wet, either by the sea water, or by the steam and dampness generated in the hold by the presence of the sea water and the changes of climate through which the vessel had passed, some of the bottles, though still corked, partly empty, the cases and their contents heated, and the wine impaired in flavor and merchantable value. *Held*, that the insurers were not liable for the loss of the wine which had escaped from the bottles; nor for injury by dampness or change of flavor to cases with which the sea water had not actually come in contact. *Cory v. Boylston Insurance Co.* 140.
3. The burden of proving a loss from a cause, and to an amount, for which underwriters are liable, is upon the assured. *Id.*

4. In computing a partial loss under a policy of marine insurance, return duties are not to be deducted from the amount to which the underwriters are to contribute. *Ib.*
5. Under the suing and laboring clause in a policy of marine insurance, the underwriters are liable for a proportion of expenses incurred in preserving the property from the operation of the perils insured against, but not of expenses of ascertaining the amount of the loss, or refitting the goods for market. *Ib.*

## INTEREST.

See TOWN, 8.

## INTERROGATORIES.

1. In an action by an administrator against an insurance company, the declaration alleged that the defendants made to the plaintiff's intestate a policy of insurance against fire on a dwelling-house situated on C. Street; that in 1849, before the expiration of the policy, the house was destroyed by fire; and that the defendants had notice of the loss. The plaintiff filed interrogatories to the president of the defendants, asking him to state whether it appeared by their records that a policy against fire, which had not expired in December 1849, was issued in that year to the plaintiff's intestate on a dwelling-house on C. Street, either on lot 2 or lot 4, according to a plan of lots; and whether the plaintiff's intestate ever notified the defendants of a loss under the policy. *Held*, that the interrogatories, so far as they were relevant, must be answered. *Hancock v. Franklin Insurance Co.* 118.
2. In an action against an insurance company to recover for a loss under a policy, interrogatories filed to their president which do not inquire for official information, but as to his personal knowledge and admissions concerning the matter in suit, need not be answered. *Ib.*
3. Whether a party to a suit, who has filed interrogatories under the Gen. Sts. c. 129, § 46, can file further interrogatories on the same subject matter, is discretionary with the court. *Ib.*

See EVIDENCE, 15.

## INTOXICATING LIQUORS.

1. Intoxicating liquors kept for sale in this Commonwealth in violation of law may be seized and forfeited as a nuisance, under the St. of 1869, c. 415, although they are so kept by a bailee in fraud of their owner and he is innocent of the illegal purpose of the keeper. *Commonwealth v. Intoxicating Liquors*, 396.
2. Intoxicating liquors intended to be sold in violation of the St. of 1869, c. 415, by a person to whom they are in course of transportation with reasonable cause on the part of the carrier to believe that such is his intention, are liable to be seized and forfeited under that statute. *Commonwealth v. Intoxicating Liquors*, 386.

3. A complaint under the St. of 1869, c. 415, § 44, for a warrant to search a vehicle for intoxicating liquors which have already been seized in it under § 57 without a warrant, relates back to the time of the seizure, and is not vitiated by describing the liquors as still in the possession of the person by whom they were kept in the vehicle at that time. *Ib.*
4. A complaint under the St. of 1869, c. 415, § 44, for a warrant to search a vehicle for intoxicating liquors, need not specify the kind of vehicle, if it identifies it otherwise; and if an unintelligible description of the kind of the vehicle is added, it may be rejected as surplusage. *Ib.*
5. The provision of the St. of 1869, c. 415, § 56, that the notice in a proceeding for the forfeiture of intoxicating liquors valued at more than twenty dollars shall be made returnable to the term of the superior court to be held in the county next after the expiration of fourteen days from the time of issuing it, refers only to terms at which criminal business may be transacted. *Ib.*
6. In a proceeding under the St. of 1869, c. 415, for forfeiture of intoxicating liquors seized, in the course of their transportation by a carrier, upon allegations that the person to whom he was carrying them intended them for illegal sale, and that he had reasonable cause to believe that such was the intention, a finding that he had such cause of belief is necessary to a judgment of forfeiture. *Ib.*
7. In a proceeding under the St. of 1869, c. 415, for the forfeiture of intoxicating liquors seized in the possession of a carrier who was transporting them to a person by whom they were intended for illegal sale, evidence of declarations of the carrier is admissible to prove that he had reasonable cause to believe that such was the intention. *Ib.*
8. In a proceeding for forfeiture of intoxicating liquors under the St. of 1869, c. 415, evidence that the claimant keeps a saloon is competent upon the question whether he intended the liquors for illegal sale. *Ib.*
9. On the trial of an issue whether A. intended intoxicating liquors for illegal sale, which were seized by an officer, at a freight depot, in a wagon with which B. was just carrying them away, there was evidence that, immediately after the seizure, A. was present, when B., in driving off with the wagon and liquors, reached the junction of a lane, which led from the depot, with a street where A. kept a saloon; that B. stopped there, and hesitated to go in a direction in which he was ordered to go by the officer, who was also present; and that A. thereupon told B. to drive on. *Held*, that exceptions could not be sustained to a refusal of the presiding judge to rule that there was no evidence for the jury. *Ib.*
10. If on a complaint under the St. of 1869, c. 415, § 51, for the forfeiture of intoxicating liquors, the person complained against does not appear as a claimant, but consents on the record that the liquors may be destroyed without publication of notice, a writ of error, brought by him to reverse the judgment, will be dismissed on motion. *Leslie v. Commonwealth*, 215.
11. A complaint under the St. of 1869, c. 415, § 44, averred that certain intoxicating liquors were kept by J. C. of Boston, "in a certain building situate

- on B. Street and numbered one hundred and fifty-two on said street in said Boston, and the first floor of said building, occupied by said J. C. as a place of common resort kept therein," and prayed for a warrant to search "said first floor of said building." The warrant described the premises where the liquors were alleged to be kept, in the same words, and directed "the first floor of said building" to be searched. *Held*, that there was no variance between the complaint and the warrant. *Commonwealth v. Intoxicating Liquors*, 216.
12. An averment in a complaint for a warrant to search for intoxicating liquors, that the place to be searched was occupied as a place of common resort kept therein, is supported by proof that the place was a shop for the sale of liquors and that persons went in there, without restriction, for the purpose of buying liquors, although the sale was conducted in an orderly manner. *Ib.*
  13. A complaint alleging that the defendant kept intoxicating liquor "with intent to sell the same in this Commonwealth, he not being authorized to sell the same in said Commonwealth for any purpose under the provisions of the acts of this Commonwealth, or by any legal authority whatever," sufficiently negatives that the alleged liquor was such as he had a right to sell. *Commonwealth v. Lynn*, 214.
  14. At the trial of an indictment for maintaining "a building, place and tenement" for the illegal keeping and sale of intoxicating liquors, it appeared that the defendant kept a saloon containing a bar and liquors, situated "in a large block." *Held*, that evidence that liquor was found in the cellar "under the building" was admissible, although there was no evidence that the cellar was connected with the saloon. *Commonwealth v. Pierce*, 487.
  15. A complaint for keeping and maintaining a tenement for the illegal keeping and sale of intoxicating liquors may be supported by proof of keeping and maintaining for such a purpose a shop consisting of one room and not forming part of a dwelling-house. *Commonwealth v. Cogan*, 212.
  16. At the trial of a complaint for keeping and maintaining a tenement as a liquor nuisance, the judge instructed the jury that evidence that the tenement was fitted up with the paraphernalia of the liquor traffic might be considered, but, inasmuch as the sale of malt liquors was permitted, the evidence, so far as it tended to show a sale of malt liquors only, should be disregarded; and that evidence that a tenement was fitted up for the traffic in liquors was of less significance now than formerly, when no sales of malt liquors were permitted. *Held*, that the defendant had no ground of exception. *Ib.*
  17. A complaint for keeping and maintaining a liquor nuisance may be supported by proof that the nuisance was kept and maintained on a single occasion. *Ib.*
  18. On an indictment for the illegal keeping of a tenement for the sale of intoxicating liquors, the judge instructed the jury that if the defendant was interested in the profits of the business, or was a partner, he could be held; that if another person was the sole owner in fact, the defendant must be acquitted and that if the jury entertained a reasonable doubt as to who was the proprie

- tor, or that the defendant was such, they must acquit. *Held*, that the defendant had no ground of exception. *Commonwealth v. Jennings*, 488.
19. On an issue whether a person was the keeper of a tenement which was used for the illegal sale of intoxicating liquors, evidence is admissible that to kegs found in the tenement were attached tags bearing his initials and the name of an express company; that barrels of liquor bearing his name or initials arrived at a freight-house, and were, in part or in whole, taken off upon vehicles running to the tenement; and that he requested a witness to say nothing about his having liquor come there. *Ib.*
20. An action cannot be maintained for the price of intoxicating liquors sold in the county of Suffolk without license, while the St. of 1868, c. 141, was in force, although the seller, before the sale, petitioned for a license, and after the sale a license was granted to him, and at the time of the sale there were no commissioners who could grant licenses. *Bolduc v. Randall*, 121.
21. A buyer of intoxicating liquors sold in violation of law may maintain an action on the Gen. Sta. c. 86, § 61, to recover back his payment for them, although he bought for the purpose of selling them again illegally. *Orcutt v. Symonds*, 382.
22. A buyer of intoxicating liquors sold in violation of law, who gives his promissory notes for their price, and afterwards pays part of the notes to a bank where the seller procured a discount of them with his own indorsement, and the rest to the seller himself, may recover from the seller, in an action on the Gen. Sta. c. 86, § 61, the amount actually received by him upon the notes both from the bank and from the plaintiff. *Ib.*

See JURY, 1.

## JUDGE.

See EXCEPTIONS, 8; FALSE IMPRISONMENT; JUSTICE OF THE PEACE.

## JUDGMENT.

1. In a civil suit in another state the defendant was not served with process, and did not appear; but, having been proceeded against in the name of the state for contempt in resisting an attachment therein, he appeared by counsel in the proceedings for contempt. *Held*, that an action could not be maintained here on a judgment rendered against him in the suit. *McDermott v. Clary*, 501.
2. A judgment against a railroad corporation for damages not limited to those actually suffered at the date of the writ, for locating and constructing their road on the bank of a river so as to divert its course and cause it to wash away the plaintiff's land, is a bar to a like action by him against them for subsequent damages from the same cause. *Fowle v. New Haven & Northampton Co.* 352.

See ALIMONY, 2, 3; COSTS; EQUITY, 2; EXCEPTIONS, 4; EXECUTOR AND ADMINISTRATOR, 2, 3; HABEAS CORPUS, 3-5; MONEY HAD AND RECEIVED, 2; PROMISSORY NOTE, 3.



## JURISDICTION.

See EQUITY, 1; HABEAS CORPUS, 1, 2; JUDGMENT, 1; WRIT OF ENTRY.

## JURY.

1. The right of peremptory challenge of jurors, given to the Commonwealth by the St. of 1869, c. 151, can be exercised on the trial of a complaint for the seizure of intoxicating liquors under the St. of 1869, c. 415. *Commonwealth v. Intoxicating Liquors*, 216.
2. The affidavit of a juror is admissible in denial or explanation of acts and declarations of his outside of the jury room, evidence of which has been introduced in support of a motion for a new trial on the ground that he had formed and expressed an opinion before the trial. *Woodward v. Leavitt*, 453.
3. Affidavits of jurors cannot be received, even in support of a verdict, to prove the part taken by any of them in the discussions and votes in the jury room. *Ib.*
4. On a motion for a new trial upon the ground of the prejudice and bias of one of the jurors, evidence was introduced that before the trial he expressed an opinion of the merits of the case, and did not disclose it upon being interrogated by the court before the case was opened. *Held*, that he might testify, in reply, that the opinion which he expressed was based wholly upon hearsay, and that when he was interrogated he did not remember having expressed it and was conscious of no bias; but that his testimony that he did not vote against the plaintiff till all the other jurors had done so, and the testimony of other jurymen that he did not take part in the discussions in the jury room, or attempt to influence them, was inadmissible. *Ib.*

## JUSTICE OF THE PEACE.

A woman cannot lawfully be appointed a justice of the peace, or, if formally appointed and commissioned, lawfully exercise any of the functions of the office. *Opinion of Justices*, 604.

## LACHES.

See AMENDMENT; EQUITY, 2, 3.

## LANDLORD AND TENANT.

1. A written notice of the landlord to determine the estate of a tenant at will in a dwelling-house where he resides with his wife, which is served by leaving it with her there while he is out of the town, is not invalidated by a mistake in his name, if she understands that it is intended for him. *Clark v. Kelüher*, 406.
2. One who has continued to occupy a dwelling-house, with his wife and family and furniture, for five days after his estate as a tenant at will has been determined by notice from the landlord, cannot maintain an action of tort against the landlord for then peaceably entering the house at a time when

the plaintiff was out of the town and his wife and family were temporarily absent, and setting the furniture out of doors, and preventing them from re-entering the house; although the furniture remained without shelter during the ensuing night, and was rained upon the next day before the plaintiff's wife was able to store it. *Ib.*

LAW AND FACT.

See EXCEPTIONS, 8.

LEASE.

See BOND, 1.

LEGACY.

See DEVISE AND LEGACY.

LIBEL.

1. In a criminal prosecution for a libel, where the defendant does not, under the Gen. Sts. c. 172, § 11, justify the libel as true, he cannot introduce evidence that the person libelled treated part of the libellous matter as a joke originated by himself. *Commonwealth v. Morgan*, 199.
2. The publisher of a newspaper in which a libel appears is *prima facie* presumed to have published the libel; the presumption is not rebutted by evidence that he never saw the libel and was not aware of its publication until it was pointed out to him, and that an apology and retraction were afterwards published in the same newspaper; and the exclusion of such evidence at his trial on an indictment for the libel gives him no ground of exception *Ib.*
3. At the trial of an indictment for publishing a libel in a newspaper at a certain time and place, the production of a copy of the newspaper containing the libel, bearing date of a day within the statute of limitations, together with evidence that it was purchased at a newspaper-stand in said place, is sufficient evidence of the time and place of publication. *Ib.*
4. A verdict on an indictment for composing, writing, printing and publishing a libel, that the defendant is "guilty of publishing as alleged in the indictment, and not guilty as to the residue," is equivalent to a general verdict of guilty. *Ib.*

See EVIDENCE, 2; VARIANCE; WITNESS, 1.

LICENSE.

A. and B., by mutual deeds of release, made partition of land which they owned in common. The deed given by A. contained a clause reserving to the grantor's use all the wood then standing on a certain lot of eight acres of the land which he released to B., with the right to the grantor, his heirs and assigns, to enter at any time and cut the wood and take it away. Each party then took and kept possession of the land released to him. A. after

wards gave C. an unsealed bill of sale of the wood on the eight acres, and C. cut the wood and took it away without B.'s knowledge. *Held*, that C. was not liable to B. for conversion of the wood. *Hill v. Cutting*, 596.

See DEED, 5; INTOXICATING LIQUORS, 20.

#### LIEN.

See CARRIER, 2.

#### LIMITATIONS, STATUTE OF.

See LOST PROPERTY ; SET-OFF ; WAY, 5.

#### LORD'S DAY.

1. One who takes a promissory note, bearing date of a secular day, before maturity, in good faith and for a valuable consideration, may maintain an action thereon against the maker, although the note was in fact so made on the Lord's day that no action could be maintained on it by the original payee. *Cranston v. Goss*, 439.
2. A person who hires a horse of its owner to drive to a particular place, and drives it to another place, is liable in tort for the conversion of the horse, although the contract of hiring was made on the Lord's day, and, as both parties knew, for pleasure only, and therefore illegal and void. *Hall v. Corcoran*, 251.

#### LOST PROPERTY.

An action for the value of a stray beast as a forfeiture under the Gen. Sta. c. 79, § 10, must be brought within a year after the owner's right of action accrued by the finder's neglect. *Wilson v. McLaughlin*, 587.

See MASTER AND SERVANT ; PLEADING.

#### MALICIOUS MISCHIEF.

See INDICTMENT, 5.

#### MANUFACTURING CORPORATION.

See CORPORATION.

#### MARINE INSURANCE.

See INSURANCE, II.

#### MARRIED WOMAN.

See HUSBAND AND WIFE.

#### MASTER AND SERVANT.

A servant who has driven a stray horse from the highway into his master's pasture, for the purpose of preventing it from straying on cultivated land,

does not become liable for its conversion by turning it into the highway again by direction of his master. *Wilson v. McLaughlin*, 587.

See ACTION, 1-3; APPRENTICE; MILK, 1; PAYMENT; RAILROAD, 3. TOWN, 4.

### MASTER IN CHANCERY.

See EQUITY, 7.

### MILK.

1. At the trial of an indictment on the St. of 1868, c. 263, for selling adulterated milk, there was evidence that the defendant, (who was a son of the owner of a milk route,) with a companion who was in the same employment with himself, knowingly adulterated milk on its way for distribution to his father's customers, and then, having charge, with his companion, of its distribution from the wagon on which it was conveyed upon the route, caused a can of it to be delivered to one of the customers by the hand of his companion. *Held*, that he had no ground of exception to instructions to the jury, that, in the absence of proof of any previous contract to supply milk to the customer, the delivery might be deemed an act of sale; nor to an instruction framed on a supposition that the jury might find that he was in the employment of his father, although there was no averment in the indictment to that effect. *Commonwealth v. Haynes*, 194.
2. The provision of the St. of 1868, c. 263, § 2, that the penalties prescribed by § 1 for knowingly selling adulterated milk may be recovered on complaint before any court of competent jurisdiction, and one half of the fine imposed go to the complainant or informer, does not exclude the superior court from jurisdiction of an indictment for the offence. *Id.*

### MILL DAM.

See NEGLIGENCE, 3.

### MINE.

See DEED, 5, 6; EQUITY, 4, 5.

### MISTAKE.

See APPRENTICE, 2; DEED, 5; EQUITY, 4, 5; EVIDENCE, 6, 15; LAND LORD AND TENANT, 1.

### MONEY HAD AND RECEIVED.

1. Under a declaration for money had and received, with a bill of particulars for money paid for a horse sold by the defendant to the plaintiff with a warranty, and returned by the plaintiff for breach of the warranty, the plaintiff cannot recover upon proof of a rescission of the contract and return of the horse by him to the defendant. *Dickinson v. Lane*, 548.

2. A conditional judgment for the full amount of a promissory note, rendered in a suit to foreclose a mortgage given to secure the note, is no bar to an action to recover back money had and received from the debtor by an attorney at law to be applied in part payment of the note, which he was then holding for collection, and on which he neglected to apply it. *Netleton v. Beach*, 499.

See TRUST, 2.

## MONEY PAID.

See PARTNERSHIP, 1; PROMISSORY NOTE, 3.

## MORTGAGE.

### I. *Of Real Estate.*

See INSURANCE, 1; MONEY HAD AND RECEIVED, 2; PROMISSORY NOTE, 12.

### II. *Of Personal Property.*

1. The condition of a mortgage of goods by F. to W. was, that F. should pay a promissory note which he had given in consideration of W.'s promise to pay his debts, and also indemnify W. against liability "on account of his having become surety for F. on a bond given by F. as principal and W. as surety" to dissolve an attachment of the goods. Such a bond never was given; but after taking the mortgage W. receipted for the goods to the officer, sold part of them, and paid F.'s debts out of the proceeds. *Held*, that the condition of the mortgage was satisfied as to the promissory note, and never applied to W.'s liability on the receipt to the officer. *Shepardson v. Whipple*, 279.

See REPLEVIN.

### III. *Of a Railroad.*

2. An indenture, by which property was mortgaged to three trustees, provided "that in case of the death, resignation or removal of one of said trustees, the premises hereby conveyed, and the trusts hereby created, shall vest in the survivors or survivor, who shall thereupon appoint in writing by deed a person or persons in the place and stead of the trustee or trustees so deceased, resigned or removed, and such appointment and the acceptance thereof shall vest the said premises and trusts in the person so appointed, jointly with the trustee so appointing, as fully as if such appointment had been originally made in this deed; and all subsequent vacancies happening in said trust shall be filled in like manner and with like effect, by the trustee in each case remaining." *Held*, that on the resignation of one, or of two trustees, the trust estate vested in the remaining trustees or trustee, and on a conveyance by them or him to a new trustee or trustees the estate vested in the three. *Ellis v. Boston, Hartford & Erie Railroad Co.* 1.
3. The title of the trustee in a mortgage given by a railroad corporation to secure its bonds is not invalidated by the fact that he is an officer of the corporation. *Ib.*

4. A contract between an express company and a railroad corporation for carrying express matter over the railroad provided that the corporation should furnish the facilities for transportation, and the company should credit it with forty per cent. of the gross receipts of the business as compensation; that this forty per cent. of the receipts should be credited on promissory notes due from the corporation to the company for sums to be advanced; that, when these notes were discharged by such credits, then the share of the corporation in the gross receipts should be paid to it monthly in cash; and that the contract should continue for five years, and such longer time as might be necessary for the discharge of the notes and interest. Before the notes were discharged, a bill in equity was filed by holders of bonds of the corporation to foreclose a mortgage made by the corporation, of all its property, for the purpose of securing its bonds, to trustees, which provided that until default the use and control of the mortgaged premises should remain with the corporation, and that on a default continuing for six months the trustees should take and operate the railroad, collect the income, and apply the receipts in carrying on the business. Pending the suit in equity, receivers were appointed to preserve the property, run the railroad and receive the earnings thereof. On petition of the express company that the receivers should carry out the contract, as it had been carried out before by the corporation, the court ordered that they should continue the performance of the service required by the contract, but that the compensation due therefor should not be credited on the notes, and its application should be reserved until the determination of the question of foreclosure. Afterwards the railroad corporation was adjudged bankrupt, and subsequently the trustees were placed by the court in possession of the property of the corporation, upon paying or securing to the receivers their expenses and charges in running the railroad. The receivers then moved that the express company pay to them the compensation due for carrying out the contract from the time of their appointment until the trustees were put into possession. The assignees in bankruptcy consented to the payment to the receivers. But the trustees claimed the compensation on the ground that the possession of the receivers was a possession on their behalf. *Held*, that the lien of the mortgagees attached to the earnings of the railroad only from the time of their being put into possession of the property of the corporation, but that they were entitled to be repaid their advance to the receivers so far as it was applied to the expenses and charges of the receivers in managing the ordinary business of the corporation in their hands, and also, with the assent of the assignees, to all the compensation which was earned after the date of the bankruptcy, not needed for the expenses of the receivers; and that, as to the compensation earned before the bankruptcy, the express company must pay so much as was necessary to reimburse the receivers for their expenses and charges, and the balance, if any, they could apply to the reduction of the debt of the corporation to them. *It*.

5. An express company contracted with a railroad corporation for the carrying of express matter over the road of the corporation and the routes of other corporations leased or controlled by it, the amounts due to the railroad corporation for freight to be applied in repayment of money to be advanced by the express company. The railroad corporation became insolvent, and receivers, appointed on a bill in equity filed by mortgagees of the corporation, having continued to carry the express matter over the roads, filed a motion that the express company should pay them in cash for so doing. *Held*, that the fact that the officers of the leased and controlled corporations induced the express company to enter into the contract and make the advance, by representations that they might safely do so, was no answer, in whole or in part, to the motion, it not appearing that the money paid by the express company was apportioned among the corporations, either by the contract between the company and the insolvent corporation, or by the contracts between the latter and the other corporations, and the other corporations not being parties to the proceedings. *Ib.*
6. A railroad corporation, to secure payment of its bonds, made an indenture, styled a mortgage, with trustees, which was confirmed by the legislature, and by which it conveyed to the trustees all the property, corporeal and incorporeal, then owned by it or thereafter to be acquired, provided that on payment of the bonds the estate granted should be void, the indenture being on the terms, conditions and agreement that until default the use and control of the granted premises should remain with the corporation, and providing that on a default continuing for six months the trustees should take and operate the road, collect the income, and apply the receipts in carrying on the business; and that, if the default should continue for eighteen months after possession taken, all equity of redemption should be foreclosed and the mortgaged property should vest absolutely in the trustees. The trustees took possession under the provisions of the indenture. *Held*, that they were not bound by a contract concerning the carrying of express matter, entered into by the railroad corporation, after the making of the indenture, with one who had notice thereof. *Ib.*

## NAME.

See LANDLORD AND TENANT, 1; PARTNERSHIP, 2.

## NEGLIGENCE.

1. A man, who sets and keeps a fire on his own land negligently, is liable for injury done by its direct communication to his neighbor's land, whether through the air or along the ground, and whether or not he might reasonably have anticipated the particular manner and direction in which it was communicated. *Higgins v. Dewey*, 494.
2. In a city where there was an ordinance prohibiting the standing of trucks in any street more than five minutes at a time without a proper person to

take care of them, or more than twenty minutes at a time in any case, an ironfounder, between three and four o'clock in the afternoon, put in the street in front of his foundry, where he knew that children were accustomed to play, a truck, with a hot iron casting, weighing nine hundred pounds, upon it, with the intention of leaving it there over night. Three hours later, two children, one of them seven years and three months old, and the other eight years old, were passing along the street on their way home, when a third boy, twelve years old, not in their company, called to them to come over and see him move the truck. They stopped to see him; and within half a minute afterwards, upon his moving the tongue of the truck slightly, the casting rolled off and fell on the younger boy and injured him. The casting was not trigged upon the truck, and was of such a shape as to roll off easily. The wheels of the truck were not trigged; and when it was put in the street its tongue was so placed that a slight movement of it was sufficient to displace the casting. When the two boys stopped, they stood at first between the truck and the foundry, which adjoined the street; and it was by the direction of his companion that the one who was injured left that position and went into the carriageway on the other side of the truck, where the casting fell on him. *Held*, in an action against the ironfounder by this boy for his injury, that the questions of the plaintiff's care and the defendant's negligence were for the jury; as also the question whether the plaintiff participated in the wrongful conduct of the boy who moved the truck; and that, if the defendant was negligent in leaving the truck in the street, or leaving it insecure, and the occurrence by which the injury was received was one which might have been reasonably apprehended as the result of such negligence, and in fact the result thereof, and the plaintiff used due care, the wrongful conduct of the boy who moved the truck would not relieve the defendant from liability, although it contributed to the result. *Lane v. Atlantic Works*, 104.

3. A person building a dam across a stream subject to extraordinary freshets is bound to construct it to resist such freshets, although they occur only once in several years, and at no regular intervals. *Gray v. Harris*, 492.

See ACTION, 4-6; EVIDENCE, 26; FERRYMAN; FRAUDULENT REPRESENTATIONS, 1; LOST PROPERTY.

#### NEW TRIAL.

See EXCEPTIONS, 7; JURY, 2-4.

#### NOTARY PUBLIC.

See PROMISSORY NOTE, 6.

#### NOTICE.

See ACTION, 4-6; INSANE PERSON; INTOXICATING LIQUORS, 5, 10; MORTGAGE, 6; PERJURY, 1; PROMISSORY NOTE, 5, 6; WAY, 11.



## INDEX.

## NOTICE TO QUIT

See LANDLORD AND TENANT, 1.

## NUISANCE.

The Sta. of 1866, c. 285, and 1869, c. 152, do not justify the refining of petroleum at any place where a necessary consequence of the manufacture is the emission of vapors which constitute a nuisance at common law by their unwholesome and offensive odor. *Commonwealth v. Kidder*, 188.

See EVIDENCE, 7; INTOXICATING LIQUORS, 1, 2, 6, 10, 14-19; WAY, 2-5.

## OFFICER.

See EVIDENCE, 1.

## ORDINANCE.

See NEGLIGENCE, 2.

## PARENT AND CHILD.

See ALIMONY, 2; APPRENTICE, 1; HABEAS CORPUS, 1, 2, 5.

## PARTIES TO ACTIONS.

See PLEADING, I.

## PARTIES TO BILL IN EQUITY.

See CONTRACT, 6; EQUITY, 6; INSANE PERSON; MORTGAGE, 5; PARTNERSHIP, 1.

## PARTIES TO CONTRACT.

See CONTRACT, II.

## PARTITION.

See LICENSE.

## PARTNERSHIP.

1. The subscribers of an agreement to purchase and run a ferry boat, to be owned by them in proportion to the amounts set against their names, the toll to be applied to pay expenses, and any balance to be divided among them *pro rata*, each subscriber to have the right to sell his stock, the purchaser to have all the rights of an original subscriber, and the association to continue as long as the majority of the subscribers shall determine, are partners; one of them can maintain a bill in equity against all the others within the jurisdiction of the court to compel them to contribute to sums paid by him, although not at their request, for the use of the association; and the amount of the liability of the defendants is to be determined by an apportionment among them of the amount paid, without regard to subscribers out of the jurisdiction. *Whitman v. Porter*, 522.

2. The fact that a man is a partner under articles which define the nature of the business of the firm, provide that it shall be done in a certain place in his name, and do not prohibit him from dealings on his own account, raises no presumption that business of a different nature, done by him elsewhere in his name, is on the joint account. *Drew v. Beard*, 64.
3. Written articles of partnership "for the purpose of trade, especially for the sale of goods and merchandise" from certain northern seaports, where they are to be bought by one partner, at certain southern seaports, where they are to be sold by the other partner, which do not limit the time of either partner exclusively to the business of the firm, or prohibit either from business on his own account, do not include within their scope a purchase of metals by one of the partners at an auction in a town several hundred miles inland from the southern seaports, their transportation to the coast, shipment north, and sale in a northern port by a factor; or a transaction in relation to cotton, which consists of his making and performing a contract with the government, to collect and rebale a large quantity of cotton in an inland district, and transport it to the coast, receiving part of it for his compensation, and of his shipment of his part to the north and sale of it there by the factor, in like manner with the metals. *Id.*

See CONTRACT, 7; EQUITY, 2, 6; EVIDENCE, 13; INTOXICATING LIQUORS, 18; TRUST.

#### PASSENGER.

See RAILROAD, 3.

#### PATENT.

See EQUITY, 1.

#### PAUPER.

1. In an action between two towns to recover for expenses incurred by the plaintiffs in supporting a pauper alleged to have his settlement with the defendants, it was admitted that he had no other than a derivative settlement, and was found as a fact that he derived a settlement with the defendants from his ancestors unless his grandfather acquired one with the plaintiffs. *Held*, that the burden of proving that the grandfather acquired such a settlement was on the defendants. *Dana v. Petersham*, 598.
2. Evidence that a man who resided in a town eighteen years, in occupation of real estate, was taxed there on his poll in five years of the eighteen, and also on real estate in four years of the five, and that in two of the five years his name was on the voting list of the town, is not conclusive that the taxes were paid by him. *Id.*

See APPRENTICE; EVIDENCE, 11; SOLDIER.

## PAYMENT.

The mere fact that a person, who employed an absconding apprentice, paid him for his services, affords no defence to an action brought against such person by the master for their value. *Bardwell v. Purrington*, 419

## PERJURY.

1. Since the St. of 1860, c. 186, § 1, it is no objection to an indictment for perjury on an examination before a commissioner "legally authorized and duly qualified to take bail" to be accepted as bail for a person committed to jail, that it does not allege whether the person was committed with or without an order fixing the amount of bail, or that any notice was given to the officer who committed him to jail, although the Gen. Sta. c. 170, § 37, require such notice if the amount is not fixed; and exceptions taken at the trial of the indictment, to the admission of the record of the proceeding, will not be sustained, if they fail to show any irregularity in the proceedings. *Commonwealth v. Hatfield*, 227.
2. An indictment for perjury, which avers that the defendant, having offered himself as bail, was required by the bail commissioner to make, and did make, a written statement of his property, the same being material to aid the commissioner in determining whether to accept him, and, being duly sworn, did falsely, knowingly and corruptly depose and swear in and by said written statement, (here setting forth the words of a statement purporting to be signed by the defendant,) sufficiently alleges that the defendant knowingly and falsely made statements under oath which were material, and is supported by proof that the defendant made oath to the matters contained in the statement set forth in the indictment, and that such statement was material, although the body of the statement was written by the commissioner, and the defendant was sworn to its truth before and not after affixing his signature. *Id.*
3. An indictment for perjury can be maintained against a person for making a false statement, on an examination to be admitted as bail, to the effect that he owned certain parcels of land, if he did not own some of the parcels, although the value of others of the parcels, which he did own, was sufficient to cover the amount of bail for which he offered himself. *Id.*

See EVIDENCE, 4.

## PETROLEUM.

See NUISANCE.

## PLEADING.

## I. Parties to Actions.

See ACTION, 6; HABEAS CORPUS, 1, 5; INSANE PERSON; MORTGAGE, 5

II. *Declaration.*

An allegation that a note is lost is supported by proof that it has been destroyed by fire. *McGregory v. McGregor*, 548.

See ACTION, 1-3, 6; EXCEPTIONS, 6; MONEY HAD AND RECEIVED 1; PROMISSORY NOTE, 1, 3.

III. *Answer.*

See HABEAS CORPUS, 4; TRUSTEE PROCESS, 1.

POST-OFFICE.

See PROMISSORY NOTE, 5, 6.

POWER.

See EXECUTOR AND ADMINISTRATOR, 1.

PRACTICE.

See ALIMONY, 2, 3; AMENDMENT; DIVORCE; EQUITY, 4-7; EXCEPTIONS, 1, 2, 6; HABEAS CORPUS, 4; INSANE PERSON; INTERROGATORIES; PROMISSORY NOTE, 2; REPORT; TRUST, 2; WITNESS, 3.

PRESUMPTION.

See ACTION, 6; EQUITY, 7; EVIDENCE, 5; LIBEL, 2; PARTNERSHIP, 2; WITNESS, 2.

PRINCIPAL AND AGENT.

The testimony of an agent, to the substance of an oral message communicated through him from the principal, is not to be excluded in evidence against the latter, upon his objection on the ground that it is hearsay. *Brown v. Leach*, 364.

See BILL OF EXCHANGE, 1; BROKER; CONTRACT, 2, 3; CORPORATION; EMBEZZLEMENT; EQUITY, 6; INTERROGATORIES, 1, 2; INTOXICATING LIQUORS, 18; LANDLORD AND TENANT, 1; MILK, 1; MONEY HAD AND RECEIVED, 2; RAILROAD, 3; TOWN, 4.

PRINCIPAL AND SURETY.

See HUSBAND AND WIFE.

PROMISSORY NOTE.

1. One who put his name on the back of a note, as guarantor before delivery, paid the amount of it to the payee, who indorsed and delivered it to him. *Held*, that he could declare on the note as indorsee, without alleging that he was guarantor. *McGregory v. McGregor*, 548.
2. An action may be maintained against all the makers of a joint promissory note alleged to be lost, upon filing a sufficient bond of indemnity before judgment. *Id.*

2. One of two joint payees and indorsers of a dishonored promissory note paid half of the amount of it to the other payee, who took up the note, indorsed the payment upon it, and, in a suit upon it against the makers, recovered judgment against them for the balance. *Held*, that the first named payee could also maintain an action against them for the amount paid by him, as money paid to their use. *Ib.*
4. B. indorsed A.'s promissory note payable on time to B.'s order, for A.'s accommodation; and A. negotiated it to C. for its full amount. At the maturity of the note, B., having been informed by A. that he could not then pay it, took it up, paying C. therefor half of the amount thereof. *Held*, that B. could recover the full amount of the note of A., in an action upon the note as payee. *Fowler v. Strickland*, 552.
5. Notice of the dishonor of a promissory note, from the holder to an indorser, by a drop-letter deposited in the post-office of the town where the holder resides, addressed to the indorser as if he also resided there, is insufficient without proof that it actually and seasonably reached him, if he resides in another post town, although he is in the habit of resorting to both post-offices. *Shelburne Falls National Bank v. Twissley*, 444.
6. If the holder of a dishonored promissory note, under cover to whom a notice to an indorser of its protest is seasonably sent by mail by the notary, from another post town where the note was payable, replaces it in the post-office without unreasonable delay, properly addressed to the indorser, it is immaterial to the sufficiency of the notice to bind the indorser, that in the ordinary course of the mails he might have received it sooner if it had been mailed to him directly by the notary. *Ib.*
7. On the trial of an action upon a promissory note, which is defended on the ground of its payment to the plaintiff, evidence is immaterial that the defendant was advised by counsel that the defence could not be maintained against a third person, who had brought a prior suit on the note, claiming to have bought it before maturity. *Woodward v. Leavitt*, 453.
8. In an action upon a promissory note, which is defended on the ground of its payment to the plaintiff before maturity, he cannot prove that, after the time of the alleged payment, he offered to transfer the note to a third person without any injunction of secrecy, and the defendant was told of the fact. *Ib.*
9. On the trial of an action upon a promissory note, which is defended on the ground of its payment, a witness for the plaintiff, after testifying in cross-examination that the question whether the note was paid was much discussed in the community, and he had taken part in such discussions, was asked by the defendant what was his theory of the way in which the plaintiff happened to hold the note if it was paid, and answered that he did not give any theory about the note, but supposed, as others did, how a case might come up. *Held*, that the plaintiff had no ground of exception. *Ib.*
10. On the issue whether a party repurchased with cash a promissory note from a person to whom he alleged that he previously sold it, evidence is competent

that about the time of the alleged repurchase he was an insolvent debtor and a borrower of money to compromise with his creditors, as having some tendency to show that he had not the means with which to pay for the note. *Id.*

11. On the trial of an action upon a promissory note, which the defendant contended that he had paid on a certain day, the plaintiff put in evidence that on a certain later day, in front of a tavern which the plaintiff had kept, the defendant said to an insurance agent that he had already told him twice that he should not get his life insured until he paid up the plaintiff, and at the same time pointed to the tavern. Thereupon the defendant was permitted to prove, against the plaintiff's objection, that the plaintiff sold and conveyed the tavern before the date fixed for this conversation. *Held*, that the plaintiff had no ground of exception. *Id.*
12. In an action on a promissory note, which is defended on the ground of its payment to the plaintiff before maturity, it appeared that when it matured an assignment of the plaintiff's estate had been made under the insolvent law; and though one of the assignees was a witness on the trial, there was no evidence that the maker of the note ever spoke of it to either of them. *Held*, that the plaintiff had no ground of exception to the refusal of the judge to restrain the defendant from arguing to the jury on this absence of evidence as confirming the defence. *Id.*
13. At the trial of an action brought by an indorsee against the maker on a promissory note, the plaintiff, to prove that the note was signed with the defendant's name by his authority, introduced evidence tending to show that it was made for the indorser's accommodation; that afterwards, in proceedings in bankruptcy against the indorser, the defendant testified that he was liable with him on a promissory note to the plaintiff, and produced a mortgage from the bankrupt, running to the defendant and two others, as security for this and other liabilities; that the validity of the mortgage was contested by the assignee in bankruptcy; and that, in a compromise between the assignee and the defendant, the note in suit was included as the one referred to in the defendant's testimony. *Held*, that it was incompetent for the defendant thereupon to prove that, in a subsequent release of the mortgage for a consideration less than the sum which it purported to secure, he permitted the other mortgagees to receive the whole consideration, because he did not consider himself liable on the note. *Draper v. Halloran*, 380.

See BILL OF EXCHANGE; DEVISE AND LEGACY, 2; EMBEZZLEMENT; EVIDENCE, 12; INSURANCE, 1; INTOXICATING LIQUORS, 22; MONEY HAD AND RECEIVED, 2; MORTGAGE, 1; PLEADING; TRUST, 1.

#### PROXIMATE CAUSE.

See INSURANCE, 2; NEGLIGENCE, 2.

#### RAILROAD.

1. An indictment under the St. of 1864, c. 229, § 37, can be maintained against a street railway corporation for causing the death of a person, although it

does not allege that the death was instantaneous. *Commonwealth v. Metropolitan Railroad Co.* 236.

2. On the trial of an indictment under the St. of 1864, c. 229, § 37, against a street railway corporation for causing the death of a person, there was evidence tending to show that the deceased, a girl two years and one month old, went from home, with her mother's consent, in the charge of a girl sixteen years old; that, when last seen before the accident, they were half way across a straight, level street, sixty feet wide; that the child was there run over by the defendants' car and killed; and that the driver of the car was at the time looking at a fire in the neighborhood. *Held*, that the evidence warranted the jury in finding that the deceased was in the exercise of due care and the defendants were guilty of negligence. *Id.*
3. If a person riding with due care on the platform of the horse-car of a street railway corporation, not as a passenger for hire, but by invitation of the driver, and without collusion with him to defraud the corporation, is injured through his negligence in driving the car, the corporation is liable. *Wilton v. Middlesex Railroad Co.* 108.
4. In an action against a railroad corporation for running a train over the plaintiff at a crossing where there was a single track and no flagman, a witness, called as an expert by the defendants, cannot be asked what is the custom of railroads in maintaining a flagman at crossings similar to the one in question, or at crossings where there is one track. *Bailey v. New Haven & Northampton Co.* 496.
5. A railroad corporation omitted to fence the line of its road in front of a culvert under the road bed; and did not construct any barrier to prevent cattle from entering the culvert, although it was practicable to maintain such a barrier without interfering with the flow of the water. The depth of water was usually enough to prevent the escape of cattle from the land of the adjoining proprietor, at the unprotected place; but on a day when the water was low, a cow which he was pasturing there passed through the culvert, and over land of another person on the other side of it, and then entered the road at a place which was also defective for want of a suitable fence, and was there injured by a passing train. *Held*, that the railroad corporation was liable for the injury. *Keliker v. Connecticut River Railroad Co.* 411.

See CONTRACT, 4; CORPORATION; JUDGMENT, 2; MORTGAGE, 2-6; WAY, 3

#### RECEIVERS.

See MORTGAGE, 4, 5.

#### RECORD.

See EVIDENCE, 4; PERJURY, 1; WAY, 12.

#### REPLEVIN.

1. A mortgagee of goods who has been summoned as trustee on a writ against the mortgagor, under the Gen. Sts. c. 123, §§ 67-71, cannot reply that

from the attaching officer during the continuance of the attachment. *Farber v. Dearborn*, 122.

2. J. S. mortgaged a chattel, in his possession but belonging to another, to the plaintiff, and afterwards sold it to the defendant; and the owner never claimed it. *Held*, that on foreclosure of the mortgage the plaintiff could replevy it from the defendant. *Adams v. Wildes*, 123.
3. If a mortgagor of goods mixes them, purposely or carelessly, with his own, and sells the whole, the mortgagee can replevy the whole from the purchaser, in the absence of evidence to distinguish the mortgaged goods from those not mortgaged. *Ib.*
4. To replevin by a mortgagee of goods against the mortgagor it is no defence that the goods are subject to a prior mortgage, if the prior mortgage provides that the mortgagor may remain in possession until breach of condition, and there is no evidence that the prior mortgagee has made any claim upon the mortgagor. *Ib.*

#### REPORT.

If an action is submitted in the superior court, by agreement of the parties, for the judge to find the facts and report the whole case for this court to decide which party is entitled to judgment, his finding of a material fact upon conflicting evidence is not open to revision, although he reports all the evidence. *Sheffield v. Otis*, 232.

#### RESCISSION.

See CONTRACT, VII.

#### RETURN.

See EVIDENCE, 1.

#### REVIEW.

See EQUITY, 2.

#### SALE.

1. A written contract for the purchase of an estate, binding both vendor and purchaser, is a sale within the meaning of an agreement to pay a commission to a broker upon sale of the estate. *Rice v. Mayo*, 550.
2. It is competent for a jury to find that a sale of a lot of tobacco was made by sample, on evidence that the seller, in the buyer's presence, drew bunches of the tobacco out of some of the cases and said that he would warrant it to be like them all through, whereupon the buyer entered into negotiations as to a price and concluded the purchase. *Atwater v. Clancy*, 369.
3. On the trial of an action for breach of a warranty of the quality of eight cases of tobacco sold by the defendant to the plaintiff, evidence is competent of a warranty as to seven of them only. *Ib.*
4. Evidence of a usage in trade to sell a certain kind of goods by sample is admissible to support testimony that a lot of such goods was sold so. *Ib.*

See BROKER; CONTRACT, 5, 9; DAMAGES; EVIDENCE, 13, 20-22; EXECUTIVE VOL. XI.



TOR AND ADMINISTRATOR, 1; FRAUDS, STATUTE OF; FRAUDULENT REPRESENTATIONS; INTOXICATING LIQUORS, 20-22; MILK, 1; REPLEVIN, 2, 3; WAIVER.

#### SAMPLE.

See EVIDENCE, 25; EXCEPTIONS, 9; SALE, 2, 4.

#### SENTENCE.

Under the Gen. Sta. c. 168, § 2, which provides that, if an offence is punishable by imprisonment in the state prison for five years or more, an attempt to commit it shall be punished by imprisonment in the state prison not exceeding five years or in the jail not exceeding one year, and that, if an offence is punishable by imprisonment in the state prison for a term less than five years or by imprisonment in the jail, or by fine, an attempt to commit it shall be punished by imprisonment in the jail not exceeding one year or by fine not exceeding three hundred dollars, a person convicted of attempting to commit an offence punishable by imprisonment not exceeding five years in the state prison may be sentenced to imprisonment in the state prison, although the offence is also punishable by fine or imprisonment in jail. *McLaughlin's case*, 325.

See COSTS.

#### SEARCHWARRANT.

See INTOXICATING LIQUORS, 11.

#### SERVANT.

See MASTER AND SERVANT.

#### SERVICE OF CRIMINAL PROCESS.

See EVIDENCE, 1.

#### SERVICE OF NOTICE TO QUIT.

See LANDLORD AND TENANT, 1.

#### SET-OFF.

The provision of the Gen. Sta. c. 130, § 18, that, if any law for the limitation of actions is alleged in defence against a demand in set-off, the limitation shall be applied as if to an action brought thereon at the same time with the plaintiff's action, exempts from the special statute of limitations of actions against executors and administrators (Gen. Sta. c. 97, § 5) a demand in set-off, pleaded more than two years after an executor gave his bond, in an action brought by him before the end of the two years. *Coll v. Cone*, 285.

#### SETTLEMENT.

See APPRENTICE, 1; EVIDENCE, 11; PAUPER; SOLDIER.

SHIPPING.

See INSURANCE, 2.

SLANDER.

See LIBEL.

SOLDIER.

The provisions of the Sta. of 1865, c. 230, and 1868, c. 328, § 3, relating to the acquirement by soldiers in the civil war of settlements in cities or towns of which they were inhabitants and as part of whose quotas they were duly enlisted and mustered, apply to drafted men as well as volunteers; and it is immaterial to the question whether a soldier gained a settlement under those provisions, that, after having been in due form enlisted and mustered, and having served one year and more, he was discharged as illegally drafted. *Sheffield v. Otis*, 282.

SPECIFIC PERFORMANCE.

See EQUITY, 1.

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**TOWN.**

1. The abutters on a street entered into a contract with the city, which was about to pave it, that if the city would leave standing a row of trees in the middle of the street, and put curb-stones around them for the purpose of protecting them, they would pay the cost of the curb-stones. *Held*, that the contract was legal, and binding on the abutters. *Springfield v. Harris*, 532.
2. Several of the abutters on A. Street in a city signed an agreement to this effect: "Provided the city will place curb-stone around the trees in A. Street, we, the subscribers, agree to pay to the city the cost of the curb-stone so placed opposite our land on our side of the street." *Held*, that the city could maintain an action against one of the signers for the cost of the curb-stones put opposite his land, although it had not put curb-stones opposite the estates of all the signers of the agreement; and that the admission of evidence, at the trial, of the reasons why it did not put curb-stones opposite the estates of all the signers, was immaterial, and afforded the defendant no ground of exception. *Id.*
3. A statute for the construction of dikes in a town under the supervision of the county commissioners provided that the expense should be borne partly by the town and partly by the owners of land benefited thereby; that the collector of the town should collect the assessments on the landowners; and that "the assessments, when collected, shall be paid to the treasurer of the

town, and after such payment and the construction of the dikes have been approved by the commissioners, the town shall be liable for all expenses lawfully incurred for such construction, and any person or persons to whom money may be due for labor or materials furnished upon any contracts with the commissioners, or by their order, may recover the same of the town in an action of contract." *Held*, that the town was not liable to a person who had constructed the dikes, and received from the commissioners an order on the treasurer of the town for payment, until the assessments were collected, and was not chargeable with interest before that time. *Hendrick v. West Springfield*, 541.

4. A town in which the highways and bridges had been injured by a freshet voted that the selectmen be its agents to repair them. Acting in execution of the purpose of the vote, the selectmen, by their servants, entered a close without the consent of its owner, and took away stone from it to repair a bridge, and by removing the stone exposed part of the close to be washed away by a river. *Held*, that the town was liable in tort to the owner of the close. *Hawks v. Charlemont*, 414.

See APPRENTICE, 1; CONTRACT, 1-3; EVIDENCE, 11; PAUPER; SOLDIER;  
WAY, 6-12.

#### TRAVELLER.

See RAILROAD, 2; WAY, 2, 4, 6-11.

#### TREES.

See TOWN, 1, 2.

#### TRESPASS.

The sexton of a church building, who is charged with the care of it and the duty of conducting funerals therein, may lawfully remove from it an undertaker, who, after being warned to desist and leave, persists in conducting a funeral there in violation of rules prescribed by the authorities of the church to maintain order and prevent interference with other religious exercises. *Commonwealth v. Dougherty*, 248.

See ANIMAL; ASSAULT AND BATTERY, 2; DEED, 4; LANDLORD AND TENANT, 2; TOWN, 4.

#### TROVER.

See LICENSE; LORD'S DAY, 2; MASTER AND SERVANT.

#### TRUST.

1. A. and B., in dissolving partnership, set off, each to the other, a specific part of the assets of the firm, and each as to the other assumed and agreed to pay a specific part of its liabilities. Among the liabilities assumed by B. was a promissory note due from the firm to his father. But instead of applying his portion of assets to pay this note, B applied them (with the

knowledge of his father that such an application was a violation of the understanding with A.) to pay a debt which he, with his father as surety, was owing individually, and another debt which he was individually owing to his father. And then his father sued A. on the firm's note. *Held*, that the assets of the firm set off to B. were subject to no trust for the payment of the note, which A. could enforce in equity against B. and his father; and that the action on the note could be maintained. *Giddings v. Palmer*; *Palmer v. Giddings*, 269.

2. A firm, which had an account against A. B., brought action and recovered judgment thereon, and land of A. B. was sold on the execution, and bid off by W. F., one of the partners, in his own name, but with an understanding between him and his partners that he "should account with them for the interest in the land at its reasonable value." On the account of A. B. in the books of the firm, the expenses of the action and sale were charged, and the rents of the land credited, to the partnership. Upon the dissolution of the firm, C. S., to whom the firm was indebted, requested the partners to convey the land to him in discharge of his debt. W. F. wrote in the margin of A. B.'s account in the firm's ledger, "To W. F., he to pay C. S.;" and the other partners assigned to C. S., in writing, their interests in the land. The accounts between the partners were afterwards settled. *Held*, on a bill in equity filed by C. S. against W. F., to compel W. F. to convey the land to C. S., that there was no trust on the land in the hands of W. F., in favor of the other partners or of C. S.; and that an amendment, changing the bill into an action for money had and received, should not be allowed, although the parties had agreed that if C. S. could have relief upon the case stated he might have leave to amend accordingly. *Homer v. Homer*, 82.

See ALIMONY, 3; BILL OF EXCHANGE, 1; BOND, 2; CONTRACT, 6; MORTGAGE, 2-6.

#### TRUSTEE PROCESS.

1. When it is sought to charge a trustee in foreign attachment on his answer, the natural import of the language of the answer must control; he is to be charged or not, according as the evidence afforded by the whole answer preponderates; and it is for the plaintiff to prove his allegations, not for the trustee to disprove them. *Cardany v. New England Furniture Co.* 116.
2. A debtor assigned property to two persons for the benefit of his creditors; all the creditors signed the assignment; the assignees accepted the trust; and the property was insufficient for the payment of the debts. *Held*, that one of the assignees was not chargeable as trustee in a suit by one of the creditors against the debtor. *Id.*

See REPLEVIN, 1.

#### UNDUE INFLUENCE.

See DEED, 1.

USAGE.

See CONTRACT, 2; EVIDENCE, 28; RAILROAD, 4; SALE, 4.

VARIANCE.

On the trial of an indictment for publishing a libel in a newspaper printed and published by two persons, proof that the newspaper was printed and published by only one of them is not a material variance, since the St. of 1864, c. 250, § 1, if the identity of the newspaper is evident and it is described so as to prevent any prejudice to the defendant. *Commonwealth v. Morgan*, 199.

See ASSAULT AND BATTERY, 1; EVIDENCE, 8; INDICTMENT, 2-5; INTOXICATING LIQUORS, 8, 11; PERJURY, 2; SALE, 2.

VENDOR AND PURCHASER.

See BOND; SALE, 1.

VERDICT.

See INTOXICATING LIQUORS, 6; JURY, 2-4; LIBEL, 4.

WAIVER.

In an action to recover damages for failure to deliver seasonably goods sold by the defendants to the plaintiffs, it appeared that, when the time agreed upon for the delivery of the goods was so nearly expired that it was evident that they could not be delivered within it, the defendants asked the plaintiffs whether they would receive the goods afterwards, and the plaintiffs replied that they not only would consent to, but insisted upon, the delivery. The plaintiffs introduced evidence tending to show that they then said that they would claim damages for any increase in the cost of the goods, produced by any advance in freights or insurance. The defendants introduced evidence tending to contradict this, and to show that the plaintiffs waived any objection on the ground of the delay. The judge instructed the jury that receiving the goods without objection on the ground of delay would be *prima facie* a waiver of any such objection, but that if, on consenting to receive the goods, the plaintiffs gave notice that they should claim damages for increased expenses growing out of the delay, then receiving the goods would not be evidence of a waiver. The jury found for the plaintiffs. *Held*, that the question of waiver was properly left to them. *Merrimack Manufacturing Co. v. Quintard*, 127.

See EXECUTOR AND ADMINISTRATOR, 2.

WARD.

See GUARDIAN AND WARD.

WARRANT.

See EVIDENCE, 1; INTOXICATING LIQUORS, 11.



## WARRANTY.

See EVIDENCE, 22; MONEY HAD AND RECEIVED, 1; SALE, 2, 3.

## WATERCOURSE.

See NEGLIGENCE, 3; RAILROAD, 5.

## WAY.

1. A. conveyed to B. a lot of land, and a building which stood more than twelve feet wide on the southwest corner thereof and extended a few feet over adjoining land of A. The deed provided that the building should so remain till removed by their mutual consent; and reserved to A. "a right of way of twelve feet in width on the southerly line of the lot." But A. had full access otherwise to his adjoining land, and there was no other land belonging to him, nor any public road, to which the way reserved would afford access. *Held*, that it did not extend under the building. *Eames v. Collins*, 594.
2. The owner of a lot of land adjoining a highway sold and conveyed part of it, excepting and reserving, without any words of inheritance, a right of way extending from the highway along the line of division between the part sold and the rest of the land, for a distance less than the whole depth of the lot. *Held*, that the right was appurtenant to the rest of the land, whether or not it was limited to the grantor's life. *Dennis v. Wilson*, 591.
3. A railroad corporation is liable for injuries sustained by a traveller, driving a horse upon a highway with due care, through a fright of the horse occasioned by a derrick which the corporation maintained projecting over the highway so as naturally to frighten passing animals, although it was maintained for the purpose of loading and unloading freight on the cars. *Jones v. Housatonic Railroad Co.* 261.
4. In an action against the proprietor of a farm adjoining a highway, for damage sustained by a person travelling on the highway with due care, through his horse's taking fright at a sled with some tubs on it, which the defendant had left in the highway, near one of his outbuildings, into which he intended to remove the contents of the tubs, the question whether the sled and tubs were a nuisance which rendered the defendant liable, depends upon whether they had remained in the highway for an unreasonable time; and upon that issue it is competent for the defendant to prove that the highway was little frequented, particularly at the time of year when the accident occurred; but not that the state of things in the outbuilding was such as to render it convenient for him to leave the sled and tubs in the highway, nor that his neighbors were accustomed to do so under similar circumstances; and the use made of highways by others under such circumstances does not determine his liability. *Judd v. Fargo*, 264.
5. Steps projecting from a house into a highway so as to obstruct it are a nuisance at common law; and under the Gen. Stat. c. 46, §§ 1, 2, maintaining

them for any time less than forty years is no bar to an indictment therefor. *Commonwealth v. Blindestell*, 224.

6. A railing by the side of a highway is sufficient within the Gen. Sta. c. 44, § 22, if it is suitable for the ordinary exigencies of travel upon such a road at such a place. *Lyman v. Amherst*, 339.
7. In an action against a town, on the Gen. Sta. c. 44, § 22, by a traveller whose horse and wagon with its load, weighing together about thirty-two hundred pounds, fell off the highway through the insufficiency of a railing by the side of it to resist their weight falling upon it from some height, the question whether the railing should have been of sufficient strength for that purpose is for the jury upon all the circumstances of the case. *Ib.*
8. A person journeying on a highway does not necessarily forfeit his rights as a traveller while he stops to pick berries by the wayside. *Britton v. Cummington*, 247.
9. At the trial of an action against a town on the Gen. Sta. c. 44, § 22, these facts were proved: The plaintiff, while driving on the highway with his wife and four young children, in a two-seated carriage, the fore wheels of which turned under its body, drawn by a pair of large horses, stopped on a level place, where the way ran along a precipitous bank, ten or twelve feet above a river and unguarded by any barrier; alighted; and walked back ten or twelve feet, to pick berries by the wayside; leaving the reins with his oldest son, who was twelve and a half years of age, accustomed to drive, and as competent and skilful as any boy of that age. His wife soon called to him to return, for the head of one of the horses was caught; and stepping to the heads of the horses he found them standing in the same position in which he had left them, but that the check-rein of one was hitched over the blinder of the other. While he was trying to unhitch it, first this horse, and then both horses, backed, so that in not more than a quarter of a minute, and within twelve feet of where he stood, the body of the carriage was swung around and one of the hind wheels went over the bank, he meanwhile endeavoring to pull the horses so as to keep them in the line of the road. *Held*, that, on these facts, the questions (1) whether the plaintiff had ceased to be a traveller at the time of the accident; (2) whether there was due care on his part; (3) whether, if he lost control of the horses, the loss was but momentary; and (4) whether the way was defective for want of a barrier; were all for the jury. *Ib.*
10. At a new trial, the foregoing facts were varied by evidence that the highway was narrow, and bounded by a high and wooded hill on the side opposite the bank, at the place where the plaintiff stopped; that he stopped in the centre of the road; that the horses, though gentle, were powerful and high spirited, and the boy with whom he left the reins had never driven them alone; that (without any evidence as to the competency and skill of this boy as compared with boys in general) he was physically and mentally the smartest boy the plaintiff had at his age; that, when the plaintiff stopped and walked back to pick berries, he observed the river below the bank, but

did not observe the precipitous slope of the bank, or observe or think whether there was any railing; that the bank was seven or eight feet high; that when one and before both of the horses began to back he seized the bits with both of his hands; that they did not back more than two or three feet before both hind wheels of the carriage went over the bank; that the carriage then drew the horses over by its weight; that until they went over he exerted himself to stop them from backing, and afterwards to keep them at right angles with the carriage so that they should not fall on it; and that, about the time when the carriage struck the water, the horses saw the bank and jumped, and he and they went over the bank together. *Held*, that the question whether there was due care on the part of the plaintiff was still for the jury. *Id.*

11. In an action against a town for an injury received by a traveller through a defect in a highway, the fact that, knowing of the defective place, he voluntarily attempted to pass it, is not conclusive of a want of due care on his part, but only a circumstance for the jury in determining that question. *Lyman v. Amherst*, 339.
12. To prove that a road was a highway before 1846, evidence that before and after that date it was repaired under the orders of one who was acting surveyor of highways of the town, and publicly exercised the duties of the office, is admissible, under the Gen. Sta. c. 44, § 26, without proving his appointment by the records of the town. *Commonwealth v. Holliston*, 232.
13. A town which has duly chosen surveyors of highways may nevertheless authorize the selectmen to enter into contracts for making or repairing the highways under the Gen. Sta. c. 44, § 11. *Hawks v. Charlemont*, 414.

See EXCEPTIONS, 2, 5; TOWN, 1, 2, 4.

#### WIFE.

See HUSBAND AND WIFE.

#### WILL.

See DEVISE AND LEGACY; EXECUTOR AND ADMINISTRATOR, 1.

#### WITNESS.

1. If the defendant in an indictment for a libel offers himself as a witness on the trial, he cannot refuse to answer on cross-examination, whether he was the publisher of the newspaper in which the libel appeared, although he was examined in chief only as to his knowledge of the publication of the libel. *Commonwealth v. Morgan*, 199.
2. On a criminal trial at which the defendant was a witness by his own request under the St. of 1866, c. 260, he requested a ruling that the presumption was in favor of his veracity like any other witness, but the judge refused so to rule and instructed the jury that there was no presumption either way as to the truthfulness of a defendant's testimony, and it was to be allowed such weight as in their judgment it ought to have, taking all the circumstances of

the case and other evidence into consideration. *Held*, that the defendant had no ground of exception. *Commonwealth v. Wright*, 403.

8. When a party introduces evidence of a quarrel between himself and a witness, for the purpose of affecting the credit of the latter, it is within the discretion of the presiding judge how far to allow the other party to show the nature and particulars of the quarrel. *Commonwealth v. Jennings*, 488.  
See CONSTITUTIONAL LAW; EVIDENCE, 23, 24, 26; EXCEPTIONS, 8;  
RAILROAD, 4.

## WOMAN.

See JUSTICE OF THE PEACE.

## WORDS.

- "Absolute inheritable title." See *Lincoln v. Lincoln*, 590.  
"Alimony." See *Burrows v. Purple*, 452.  
"Chargeable" to a town. See *Bardwell v. Purrington*, 426.  
"Comfortable support and maintenance." See *Conant v. Stratton*, 474, 494.  
"Complaint." See *Commonwealth v. Haynes*, 197.  
"Destroy." See *Commonwealth v. Sullivan*, 218.  
"Enlisted." See *Sheffield v. Otis*, 284.  
"False pretence." See *Commonwealth v. Whitcomb*, 486.  
"For the use of." See *Stockbridge Iron Co. v. Hudson Iron Co.* 324.  
"Forever." See *Dennis v. Wilson*, 593.  
"Furnish evidence against himself." See *Emery's case*, 182.  
"Guarantee." See *Thayer v. Wild*, 452.  
"Injure." See *Commonwealth v. Sullivan*, 218.  
"Leakage." See *Cory v. Boylston Insurance Co.* 145.  
"Leave the company." See *Price v. Minot*, 60.  
"May." See *Commonwealth v. Haynes*, 197.  
"Need." See *Conant v. Stratton*, 474.  
"Of." See *Hannum v. Kingsley*, 361.  
"Reserving." See *Stockbridge Iron Co. v. Hudson Iron Co.* 321.  
"Sale." See *Rice v. Mayo*, 550.  
"Sufficient." See *Lyman v. Amherst*, 339.  
"Tenement." See *Commonwealth v. Cogan*, 214.  
"Traveller." See *Britton v. Cummington*, 347.

## WORK AND LABOR.

See PAYMENT.

## WRIT OF ENTRY.

A writ of entry to recover land which has been set off and seisin and possession thereof delivered to the demandant, on execution upon a decree of alimony made by this court, may be brought in the superior court. *Burrows v. Purple*, 428.

## WRIT OF ERROR.

See COSTS; INTOXICATING LIQUORS, 10.

**ERRORS NOTED IN PREVIOUS VOLUMES OF THIS SERIES.**

**VOL. CV.**

**Page 16. Top line. Substitute “§ 89” for “§ 80.”**

**Page 177. 16th line from top. Substitute “§§ 1, 2,” for “§ 16.”**

**VOL. CVI.**

**Page 194. 26th line from bottom. Substitute “101 Mass.” for “100 Mass.”**

**Page 261. 6th line from top. Substitute “defect” for “defeat.”**

**Page 513. 17th line from top. Substitute “whose” for “what.”**















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